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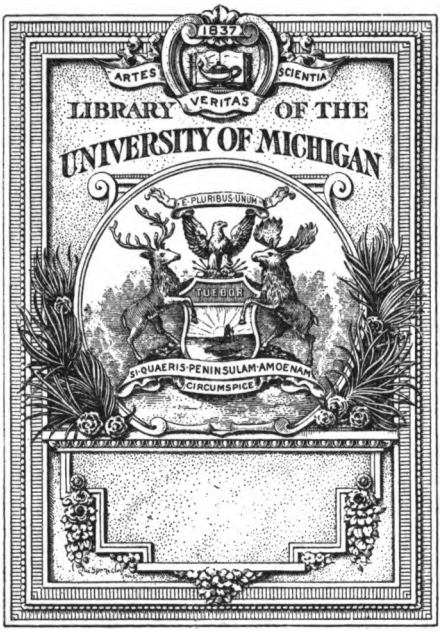

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NOTE BY THE EDITOR.

THE subject of Judicial Procedure was a very favourite one with the Author, and one to which he was continually in the habit of recurring for more than thirty years. The consequence was, an immense mass of MSS. on this subject, extending to several thousands of pages, was found at his decease. Very many of the Chapters were written over and over again, each of them varying in some particulars: and all of them were more or less in an unfinished state. In preparing these MSS. for publication, the principal object throughout has been, as far as possible, to present the text in the very words of the Author. The arrangement, I am fully aware, is not so logical as it ought to have been, or as it would have been, if the Author had lived to finish the Work. The difficulty was occasioned by this circumstance. In some Chapters, which in strictness ought to have followed others, allusions were made to the contents of those others, as if they were already known to the reader, and therefore they would not have been so readily understood, unless they had been made to follow, without making greater alterations in the text than I felt myself justified in doing. The plan pursued with respect to those Chapters which treated of the same topic, has been to incorporate the separate matter of each into one. and cancel the rest. Although much has been done in this way, and also in cancelling other repetitions, yet I fear some still remain, which should have been omitted. If this be found to be the case, the only apology I can offer is, that in a task of this responsible nature, I considered I should be erring on the safer side by retaining too much, rather than too little.

By far the greater portion of the Work was written between the years 1820 and 1827, both inclusive. Parts of the Introduction and the first Chapter were written so long ago as 1802, and may be distinguished by the style. In order fully to appreciate the merits of the arrangements here proposed, reference must be made to all that concerns the Judicial Establishments and the Minister of Justice, in the Constitutional Code. The Author's great Work on Evidence should also be consulted.

In the Appendix will be seen the commencement of an "Initial Sketch of Procedure," which was written under circumstances somewhat interesting. In the Autumn of 1825, the Author visited Paris for the benefit of his health. On his return, he was detained at Boulogne by a contrary wind for nearly a fortnight, and there at the end of that time this Sketch was written. It was the first thing written by the Author for nearly three months, during which his indisposition continued.

The paper on Account-Taking Judicatories was intended by the Author to be attached to the Procedure Code; although it partly belongs to the Constitutional Code.

Two very instructive communications follow, on judicial matters in the East Indies. One is from Sir Alexander Johnston, the distinguished Chief-Justice of the Island of Ceylon; the other from a highly valued friend of the Author, who is now in India; I have not therefore been able to ask his permission to publish his name.

RICHARD DOANE.

London, 30*th December* 1837.

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PRINCIPLES OF JUDICIAL PROCEDURE,

WITH THE OUTLINES OF A

PROCEDURE CODE.

PREFACE.

Of the present publication, the particular object is the preserving the country from being saddled by institutions, which under the profession, sincere or insincere, of contributing to the formation of an appropriate code of procedure, will have the effect rather of retarding, or even preventing it, and, at the same time, adding to expense, by which no fruit in the shape of benefit will be produced.

A Procedure Code, fit to be invested with the form of law, could not be prepared otherwise than by and with reference to the codes of law, penal and non-penal, to which it has for its object and purpose the giving execution and effect.

The present production, instead of following, precedes both these codes. If applicable in other respects, it will not be found on that account inapplicable to its intended purpose.

With regard to prospect of success, the sense of the public mind may as well be taken by this uncompleted and provisional publication, as by a completed work.

The characteristic features, and fundamental principles—all will be seen brought to view: only in respect of matters of detail, will there be anything to add, to defalcate, or to substitute. As of the plan here proposed, with its supposed features of aptitude, so of the system at present in force, with its supposed features of inaptitude.

On this occasion I shall be found (I hope) to have rendered sufficiently apparent the complete inaptitude of the established system with reference to its professed purpose; and thence the absolute and indispensible necessity of a code, entirely new, from beginning to end. This, supposing it done, will be no small thing done.

What is more, here is much which, in the character of a proposed code, all persons who feel inclined, may take in hand, and take for the subject of consideration and publication; and by this means, towards ultimate success so much advance will have been made.

It might perhaps not be a great deal too much to say of it, that in its present state, it might form a warrant for the appointment of a Committee of the House of Commons, and the consideration of it, the subject-matter of a portion of the labours of such a committee; and while the committee was occupying itself in the requisite labour, on its several points (including what regards the judiciary establishment, which is already in print,) I shall, if alive, be occupied according to the measure of my ability, in making such amendments as I find a demand for.

The reason for this hurrying, is the fear of seeing real improvement obstructed, and even improbabilized, by the creation of new offices, with enormous salaries attached to them.

Let me ask, how many centuries would it take to remove the already generally-acknowledged abuses, at the rate of progress at which the operation has been, and is performing, by the recent statutes?

No objection however to these; in the road to reform, every inch made is better than none.

INTRODUCTION.

By procedure, is meant the course taken for the execution of the laws, viz. for the accomplishment of the will declared, or supposed to be declared, by them in each instance. Laws prescribing the course of procedure have on a former occasion been characterized by the term *adjective* laws, in contradistinction to those other laws, the execution of which they have in view, and which for this same purpose have been characterized by the correspondent opposite term, *substantive* laws.

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For in jurisprudence, the laws termed adjective, can no more exist without the laws termed substantive, than in grammar a noun termed adjective, can present a distinct idea without the help of a noun of the substantive class, conjoined with it.

As in fact every act by which a course of procedure is commenced has for its end or object, the bringing about the execution of some law of the substantive class, so, in point of utility, it may be said that the course of procedure ought to have in every instance, for its main and primary end at least, the accomplishment of the will manifested in the body of substantive laws. For this is not only a use of it, but the only use for it.

The ultimate utility of it will therefore depend altogether upon the utility of the substantive laws, the execution of which is in each instance endeavoured to be brought about: unless the substantive law be conformable to the greatest happiness of the community, the use made of the body of adjective laws on that occasion cannot be conformable to that same end. But though this may with truth be given as the main and primary end of the course of procedure, it cannot however be given as the sole end; because in the pursuit of that same end, a variety of inconveniences are apt to occur, and indeed in a certain degree cannot several of them but occur — in every instance: hence result, as so many collateral or subordinate ends, the avoiding as far as possible the giving birth to those several inconveniences.

The code of procedure, then, is composed of the system or assemblage of adjective laws.

Of the substantive branch of the law, the only defensible object or end in view, is the maximization of the happiness of the greatest number of the members of the community in question.

Of the adjective branch of the law, the only defensible object, or say end in view, is the maximization of the execution and effect given to the substantive branch of the law.

The present proposed code is composed of an aggregate of arrangements, having the above for their object, or end in view.

Of every extensive body of law, the end, mainly at least, if not exclusively, in view, has been the greatest happiness of those by whom the body of law in question was made.

Consistently with the nature of man, and the preservation of his species, no other could any extensive body of law have had for its end in view. For proof of this position, see the Constitutional Code.

In a representative Democracy, if rightly constituted, the possessors of the constitutive or supreme authority are the aggregate body of the members fitted for self-government; and the possessors of the legislative authority are their delegates, and would represent their interests.

In the case of an Aristocracy, the interests of the members of the aristocracy, or the majority of them, would prevail; and in the case of a Monarchy, the interest of the monarch.

In a mixed monarchy, composed of the monarch and the aristocracy, it would be the conjunct interest of the monarch and the members of that same aristocracy that is to say, of the majority of those who act on the theatre of legislation.

In the case of a mixed monarchy, composed of the monarch, the aristocracy and the delegates, or say deputies, of the people, the conjunct interests of those same three authorities.

Thus much as to substantive law. But in the case of adjective law, or say procedure law, to a greater or lesser extent the law has had for its authors, in proportions infinitely diversified, legislative authority (in its several modifications,) and the judicial authority — in a word, the judges, who under the notion of interpreting, where, in fact, there was nothing to be interpreted — have been suffered, in effect, to legislate. The consequence is, that in correspondent proportions, this branch of the law has had for its object, or end in view, the interest of this class of the functionaries concerned in the making of it.

But more especially in the mode in which their remuneration has commonly been allotted to them, is their interest in a state of diametrical opposition to the interest of those for whose benefit the laws are everywhere professed to have been made.

By the author of these pages, no share in that profit was ever aimed at, or desired, nor at present could by possibility be received: his interest is therefore in the state of the greatest possible harmony with what he has made his duty; and accordingly, wheresoever it may have happened to him to have erred, the error will have had a deficiency not in moral, but in active and intellectual aptitude for its cause.

Among the arguments employed, and which, since some recent occurrences, have been made use of, for stopping the progress of improvement (and securing against diminution the addition made every year to the number of those who, by and for the benefit of lawyers, are punished for not knowing what they have been carefully kept under an impossibility of knowing,) one is — You cannot provide for everything; therefore you ought not to provide for anything more than what has been provided for already.

To understand the force and value of this argument — the aptitude, moral and intellectual, of those by whom it has been employed — employ it to other branches of art and science.

Without going out of the field of legislation, apply it to substantive law. Apply it

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to medicine: you cannot cure all diseases — why give yourselves so much trouble in the endeavour to cure any more than you can already.

For the enactment, or say establishment, of any law, or of any mass of the matter of law — of two species of power — the intellectual and the political — the concurrence, or say conjunction, is necessary: intellectual, that of the legislative draughtsman; political, that of the legislator. The political cannot, in the most improved state of society, be with propriety in hands other in number than a select few: in the least improved, it has everywhere been of necessity in the hands of a single person.

But before it comes to be presented to the legislative assembly in the legislation chamber, there is another tribunal in which, with great advantage to the public, every question of law which is invested with a certain degree of importance may be introduced — and that is the public-opinion tribunal. For the purpose of introducing into this tribunal a proposed law, the right of initiation appertains at once to every person who can find adequate inducement for giving exercise to it.

In the legislative assembly, proposed laws cannot without confusion be taken into consideration, and compared together, in any considerable numbers. But by the public-opinion tribunal, they may be subjected to this operation, in a number altogether unlimited.

To introduce, or attempt to introduce, into the legislative assembly, a mass of law of a new complexion, before the minds of men were to a certain degree prepared for the reception of it, would be lost labour, and a hopeless task. Not so the like attempt in relation to the public-opinion tribunal.

Why set about drawing up a perfect body of laws — that is to say, one which to yourself you expect will appear so? — why give yourself any such trouble? Suppose the task of drawing it up accomplished, can you seriously expect to see it, in that place, put to use? — can you flatter yourself with any such hopes?

Answer: No. But, to a person who has leisure, and who has the means of living while the work is going on, that consideration is no sufficient reason for declining the task.

In the present instance, the work must of necessity be the work of many years — say six, eight, ten years. Now, suppose it a settled rule that no such work shall be begun to be drawn up till a probability of its being immediately taken into consideration in the legislative assembly (and ultimately adopted) has presented itself, — what is the consequence? Answer: That the necessary time in question — the six, eight, ten years — will be lost: the public for that whole length of time deprived of the receipt and enjoyment of this all-comprehensive instrument of felicity.

Oh! but this is innovation! — Oh yes — unquestionably; it is innovation. But what follows? From misery, whatever be the shape of it, a change to tranquillity is innovation. From war, whencesoever it comes, change to peace is innovation. War, misery, wickedness in every shape — are they then to be perpetuated? — all for fear of innovation?

Whoever takes in hand these pages, will do well, in the first place, to lay out of his mind everything that belongs to the existing system, baptized the *technical*. He will see there, when the time comes, nothing but confusion — a purposely and most elaborately organized system of confusion. Of itself, it accordingly explains nothing: explanation it requires itself throughout, so far from being capable of affording it. In the here proposed system, styled the natural, he will see the course prescribed by common experience and common sense. The purpose being to give execution and effect to a system of arrangements and ordinances, by elicitation made of the truth of facts, the question will always be, whether this or that one of the arrangements made, or supposed made (supposed only in the case of the unwritten law,) has application to the individual case in question.

For arriving at the truth, the natural course, it will be seen, is the same in all cases. Under the technical system, the course pursued is different, according to the various judicatories employed, with their different portions of the field of law (logical or geographical) assigned to them, or occupied by them, with corresponding different sets of powers and duties — common law, equity law, civil law, penal law, ecclesiastical law, admiralty law, general sessions law, petty sessions law, and so on — all differing so widely from one another, while pretending to be directed to one and the same object, — the discovery of truth in regard to facts, by means of evidence. All of them good, it is impossible they should be; all bad, it is altogether possible they should be, and will accordingly be seen to be; all unapt — relation had to such their professed and falsely pretended purpose; all good, — relation had to their non-professed, but disguised, and endeavoured-to-be-concealed, purpose: — viz. the promotion of the particular and sinister interest of the institutors, at the expense and by the sacrifice of, the universal interest.

Of the proposed system, these are the leading features: —

1. Expense of *litiscontestation*, defrayed as far as possible by the public.

2. Cases of necessity excepted, attendance

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of parties in their own case, not less universal and punctual than that of third persons in the character of witnesses.

3. With ample precaution against abuse, necessary expense of evidence, and professional assistance, provided by the public, for those who are not themselves in a condition to defray it.

4. For the verity of whatever statement is made on a judicial occasion, or actually or eventually for a judicial purpose, effectual provision will be made, — and that the same in all cases, — by appropriate punishment, and without the intervention of any useless ceremony.

CHAPTER I.

GENERAL VIEW—ENDS OF JUDICATURE.

WHEN the whole body of the Law has for its object the greatest happiness of the greatest number, the whole of the adjective branch taken together may be said to have two specific ends: the one *positive*, maximizing the execution and effect given to the substantive branch; the other *negative*, minimizing the evil, the hardship, in various shapes necessary to the accomplishment of the main specified end.

Between these two pursuits the conflict is all pervading and perpetual. Whatsoever arrangement is taken for the attainment of the one end, it can scarcely avoid being in a greater or less degree obstructive to the attainment of the other end.

If, whether it be with a view to compensation merely, or to compensation and punishment together, measures of adequate strength for securing eventual forthcomingness on the part of the defendant — person and property included — be not taken, injured individuals, who are, or would, or should have been, prosecutors, or say pursuers, remain without redress—without indemnity for the past, or security for the future: if measures of more than adequate strength are taken, evil-doing defendants not only may be made to suffer more than is necessary; but, what is worse, hardship (to an indefinite amount) may be made to fall on the heads of men who have not in any way been evil-doers; and then not only with and by, but even without, any evil consciousness or evil intention on the pursuer's side.

In this way the judicial establishment (how well and faithfully soever the duties of it may be performed) may be made the instrument of oppression, and even of depredation. No intellectual aptitude — no active aptitude — no appropriate knowledge or judgment on the part of the judge — can render him completely secure against so deplorable a result. No otherwise than through the medium of such information as comes in his way, or is obtainable by him, can he ever act, or forbear to act. If that information is false, and by means of its falsity deceptive, a wrong judgment is on his part unavoidable.

On this occasion, as on every other, the grand security of securities is *publicity*:— exposure — the completest exposure of the whole system of procedure—whatever is done by anybody, being done before the eyes of the universal public. By this means, appropriate moral aptitude may be maximized— appropriate intellectual aptitude may be maximized — appropriate active aptitude may be maximized. The greater the tutelary influence exercised over the judge by the public eye, the more intense will be the attention on each occasion bestowed by him, in the endeavour to obtain adequate knowledge, and give maturity and correctness to his judgment, as well as quickness to the exercise given on this occasion to his active faculties.

Still, however, against deception by false assertions and false evidence in other shapes, the soundest judgment can never be secure.

What remains, then, is, to provide what security can, without preponderate hardship be provided against falsity uttered by an individual coming in the character of a pursuer, with the view to subject to a hardship, a defendant on whose part no wrong has had place.

Of the necessity of making arrangements of this sort—of the difficulty that attaches upon the endeavour—no adequate conception can ever have been formed by those whose thoughts have been confined within the bounds of the field, occupied by the arrangements taken with this view in any body of law that has ever been in force. In every such body of law, the expense and vexation, attached without distinction to the operation of legal pursuit in every case, tend with a force proportioned to the aggregate force of the complicated mass of hardship, to the prevention of ungrounded and ill-grounded suits.

Such is its tendency, and such to a prodigious extent is its effect, independently of all intention and desire on the part of those by whom the system was framed, or those by whom application is made of the powers established by it. To the production of this thus far salutary result, not only is no such endeavour or desire necessary, but in spite of their most strenuous endeavours to the contrary, it could not be prevented from taking place.

At the same time, while without, and (to an even universally-indefinite extent) against any such intention, this mass of hardship is in this shape productive of good effects; in another shape it is to an unmeasurable extent productive of evil effects. It is an instru-

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ment put into the hands of the oppressor — of every oppressor who is rich and wicked enough to purchase the use of it, at the hands of those who, according to the intention of those by whom it was made, continue to reap the profit — an instrument, by which, under the yoke of one-tenth of the population, nine-tenths are kept in an oppressed state, and but for the salutary, though scarce perceptible influence of the public-opinion tribunal, would be kept in a state of the most abject slavery.

That, on the part of rulers, the evil is everywhere the result — not of oversight, or deficiency in intellectual aptitude, but of purposed intention and endeavour—is matter of demonstration. For everywhere not only are the obstacles in question left in full force, without any endeavour to remove or lessen them, but addition, and to a vast amount, is made to their force — made, too, by instruments of their own manufacture — made by them, with the manifestly-resulting effect, and thence with this unquestionable purpose, namely — the creation of law-taxes and law-fees: law-taxes imposed by the rulers for the increase of their own excessive opulence; law-fees, which in their legislative capacity they suffer their colleagues and instruments to exact for the increase of their own exorbitant wealth, thus amassed by the application of oppression to the purpose of depredation.

Thus, then, the endeavours of the philanthropist in the law may be expressed by this one problem: how to unite the maximization of redress for the injured in the character of pursuers, with the minimization of hardship on the innocent in the character of defendants.

These being the ends, the means may be stated as follows: —

1. In so far as necessary, under the name of security for eventual justiciability, on the plaintiff's side, a condition imposed, to the obtainment of the judicial services for the alleged purpose of seeking redress for injury.

2. In case of an unjust demand, for the prevention of needless and unprofitable vexation and expense (such as might otherwise be imposed on individuals in the situation of defendants, by individuals placing themselves in the situation of plaintiffs,) a provision made, not only of eventual compensation but also of punishment, to be inflicted on those alone in whose instance the existence of blame, in one of two shapes, has been established.

These two shapes are — 1. Evil consciousness; 2. Temerity or rashness.

By evil consciousness, understand, on the part of him by whom a suit is commenced or carried on, a consciousness of the injustice of it—of the non-existence of all adequate ground for it.

By temerity or rashness, understand the absence of that due attention, by which, if bestowed upon the subject, he by whom an unjust suit is commenced would have been rendered conscious of the injustice of it.

By way of punishment, suppose law-taxes enforced against such suitors as have been found to blame. Tax for vexatious pursuit: tax for vexatious defence.

In certain cases, assistance should be rendered at the expense of the public, or of spontaneously-contributing individuals; assistance afforded to persons to whom (whether on the pursuer's or on the defendant's side) the inability to defray the expense of pursuing the necessary means of obtaining justice would otherwise render them destitute of the means.

The sources of such expense are —

Procurement of evidence, in the case where expense is necessarily attached to the elicitation of it: namely, — 1. In the case of oral evidence, the expense of conveyance to and from the abode of the proposed witness to and from the seat of judicature; 2. The expense of demurrage at the seat of judicature; 3. Loss of time, which, to those to whom time is an indispensable source of subsistence, is tantamout to expense; 4. In the case of written evidence, the expense of making the necessary transcripts. There is also the correspondent expense in the case of appeal.

The sources of receipt in all cases are —

1. Voluntary and gratuitous contributions on the part of judicial assessors and others, to whose cognizance the case has happened to make its way.

2. Under the eye of the judge, purchase of assistance for this purpose, by engagement to repay in case of success, together with a premium adequate to the risk.

3. A fund to be provided for this purpose at the expense of the public.

As to *blame*, independently of any which may have had place at the origin of the suit: on the part of the pursuer, in the case of a pursuit accompanied with the consciousness of its groundlessness; on the part of the defendant, a defence under the like consciousness of its groundlessness, — blame may have place on either side; and this as well on the part of him who knows himself to be in the wrong, as on the part of him who, being in the wrong, knows not that he is so. Such will be the case in so far as, on either side of the cause, arrangements are taken, having for their effect (whether they have or have not had for their object) the production of needless vexation or expense on the part of the opposite side.

As to the provision of fine or other punishment for vexatious pursuit or defence, if security in that shape were not provided, observe the evils that would ensue.

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For the purpose of minimizing vexation and expense, or rather for the purpose of avoiding to create it, one fundamental general rule is, exceptions excepted — obligation of personal appearance at the judgment-seat, on the part of all parties as well as witnesses.

Of this arrangement, the necessity to justice, that is to say, to all the necessary ends of justice, will be shown further on. For the purpose of the argument, let it here be previously assumed.

Now, then, observe the consequence.

Every person being compellable to appear at any time, and thus at all times, at the instance of any person or any number of persons appearing in the character of plaintiffs — and no person prevented from appearing in that character, or punishable for the vexation produced as above — the whole life of any person, or of persons in an indefinite number, might be completely occupied by calls to this effect: a tyranny exerciseable over all would thus be put into the hands of all — a tyranny, and of such sort as would have, amongst other effects, that of a licence to commit murder, by cutting off from men, in any number, the means of earning their subsistence.

Of the demand by which commencement is given to a suit, what in every case is the object? Answer: In every case, to give execution and effect to the corresponding portion of the law.

Good. But as many as are the different remedies, and so many as are the different forms and proportions in which they are capable of being applied, and, to suit the individual wrong or individual right in question, require to be applied — how can the same course of procedure, or even any small number of different courses of procedure, be in itself applicable, or be capable of being made applicable to each?

Answer: In this way. What they have in common is this: — For the judge to be able to give execution and effect to the appropriate portion of law involved, whatever it may turn out to be, what is necessary is, — that the means of execution be in his power — at his disposal — in his possession, or at his command. These are the person, reputation, property, and in certain respects, condition in life, of the parties, and in particular of the defendant, together with any such miscellaneous valuable right as it may happen to the party to be in possession of.

But omitting, for shortness, reputation and condition in life, for placing the person and property at the judge's disposal, the means requisite are exactly the same, whatsoever may be the disposition which, by his ultimate terminative decree, he may deem it advisable to make of them. In regard to the person, to keep it in confinement for a single day, or for the whole of life — or, supposing the law to permit it, to substitute death to life. Thus it is, that in the case of the most trifling pecuniary demand, and in the case where the whole property of the defendant — his personal liberty, during the whole of his life, or even his life itself, — is at stake, the means, if not of actual execution, of being in a condition to order and effect actual execution, will be in every case the same.

In regard to these same means of execution, one considerable difference, alas! will be found to have place between the means of execution applying to the case where the remedy required is of the most burthensome kind to the proposed defendant, and that in which it is of the least burthensome kind. The more urgent the need which the party on the pursuer's side may have of the remedy sought by him at the charge of the defendant's side, the greater the need there is of the judge's putting himself in the possession of the physical faculty of applying the appropriate remedy, how burthensome soever to the defendant. But in many cases, the determining to wait till full proof can have been made of the justice of the demand, would be in effect to render the fulfilment of the duty of giving execution and effect to the appropriate portion of substantive law impossible: for, in the meantime, and while the proof was in collection, person and property would be out of the reach of the judge. Thus, in cases of a certain degree of importance, the need of a sort of provisional means of execution, of which in these cases the eventual good has a preponderance over the actual evil.

In regard to the *means of probation*, the coincidence is still more entire. Be the demand what it may — be the appropriate means of execution and effect what they may, the evidence adapted to the purpose of obtaining credence for the alleged matter of fact in question will be the same: the means requisite to be taken for coming at the source of the evidence, and eliciting it from its sources in the best shape, will always be the same.

True it is, that in this case, as in that of giving execution to the law, the proper answer to the question, whether to obtain the alleged evidence, or to leave it unobtained, will depend upon the ratio of the lot of evil to the lot of good — the evil in the shape of delay, vexation, and expense, from the elicitation of the evidence, — and the good from its conduciveness to right decision, in other words, the security it affords against deceit and mendacity, by either of which execution and effect would be prevented from being given to the law.

On this occasion, if of half-a-dozen different sorts of judicatories under the same government, — each of them, for the ascertaining of the truth in relation to one and the same alleged matter of fact, pursues a differ-

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ent course in relation to evidence, — in the wrong they may be, all of them, and are — in the right, courses more than one there cannot be.

Means of communication, of persons needful with persons needful, and of persons needful with things needful: — be the demand what it may, be the particular mode of execution what it may, be the facts of the case what they may, be the appropriate sources of evidence, and the mode of eliciting it, what they may, — the means best adapted to the purposes of effecting the communication necessary between the persons and things in question cannot in any case be different. As to the question, — will it, in the present case, for the purpose of obtaining the evidence, be worth while to employ the means of communication necessary for that purpose? In this case, as in the former, the balance may in some cases require to be taken in hand, and the good expected from employing the necessary means of communication, weighed against the evil inseparable from the employing them.

CHAPTER II.

ENDS APT AND UNAPT.

By the apt ends of judicature, understand the ends of justice, as per Chapter I.; by the unapt, all other ends.

The powers of judicature are the powers exercised by judges as such — exercised by judges (as to a greater or less proportion) in pursuance of their own will, but everywhere and at all times under the controul of a superior authority: in pure monarchies, that of the monarch — in the English monarchy, that of the monarch with the aristocracy under him, constituting together the parliament.

All power has had everywhere, and at all times, for the end of its exercise, the good, real or supposed, of those by whom it has been exercised.

In the formation of the English system of judicature, the judicial has ever been the active, the ordinarily-operative power; that of the monarch, with the rest of the parliament, the controuling only; the authority always capable of exercising that power, and now and then, but very rarely, actually exercising it.

The formation of English procedure began before parliaments were established.

Of this system, the pretended ends would of course always be (or at least have been, and on inquiry *would* be now) the ends of justice, — the ends of justice as above enumerated: the real end, and if not the sole end, at any rate the main and ultimate end, the good of the judges — of those members of the judicial establishment who have borne their respective parts in the framing of it; — the obtaining and securing for their use the greatest possible portion of the objects of general desire, and in those large masses which none but those amongst whom the powers of government are shared can possibly possess. These may be styled the sweets of government: power, wealth, factitious dignity; ease, at the expense of official duty, and vengeance at the expense of justice.

Hence then another, but not inconsistent account of the ends of judicature, is this: maximization of depredation and oppression. Of depredation, wealth is the fruit: of power, oppression and vengeance.

The only end of the English system that is ever brought to view, is — the keeping up the customs commenced in the darkest ages.

In every political community as yet in existence, widely different from the only proper, have been as yet the actual ends of judicature.

Judicature is a branch of government; the judicial system of the aggregate official establishment.

In every political state, the actual ends of government have been the maximization of the happiness of the aggregate of the persons bearing respectively a part in the exercise of the powers of government.

Proportioned to the share possessed by the judges (and their associates in the profession out of which they spring) in the powers of government, has been, in every political state, the degree in which their interests have been promoted, in and by the arrangements of law, at the expense of all rival interests. In pure and absolute monarchies, the men of law, of whom the judges formed a part, having neither power nor influence but what they derived from the monarch, have found themselves under the necessity of taking for the main object of their labours, the sinister interest of the monarch: and it is but by stealth, and in virtue of, and in proportion to, his ignorance or carelessness, that they have been able to introduce any arrangements favourable to their own sinister interest, at the expense of his.

Very different has their situation in this respect always been, in England. The grand instrument of despotism, a standing army, not having sprung up in England till a system of government, suited to the purpose of the judges and other lawyers had been formed by lawyers, the monarch, in the measures taken for the advancement of his own sinister interests, felt himself under the necessity of letting in their sinister interest for a considerable share of the benefit. Other hands, still more obsequious, could he have found them, would of course have been employed by him in preference; but no such

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hands did the nature of the case afford. In the field of law, covered as it was by a jungle of their own planting, none but themselves could find means to move. Awed by parliaments, which though *in esse* as unfrequently, and for as short a time as the craving rapacity of the monarch could contrive, were continually *in posse*, it was only by an obscure and tedious road that the judges could make their way in the prosecution of their designs: while, by fresh power and fresh sources of profit, as occasion offered, thrown into his hands, these ever-dependent creatures of his were ministering to his rapacity, he through ignorance or indolence connived all the while at theirs. While by fines and confiscations they were filling his coffers, by fees or addition to salary he connived at the rapacity practised by them for their own benefit.

This object, however, they found it beyond their power to accomplish, without a variety of false pretences. Lies accordingly were the instruments, by which on every occasion the dirty part of their work was done: and in such numbers, and of so gross a texture, were lies of rapacity uttered by them, that in the career of rapine and mendacity, all the most profligate of their brethren of the trade in other countries were left far behind.

In the accomplishment of their object, thus were they obliged to proceed in a retail way, and by short steps; taking money no otherwise than by the offer made of their services to the parties,—in the shape of fees; and these fees, considering the poverty of the greatest part of the contributors, separately taken, unavoidably small ones. At one time indeed they had formed higher projects: instead of picking it up by driblets in the shape of fees, they had begun to work for themselves as they had been used to do for the monarch, and confiscated whole estates at once to their own use, as they had been in the habit of doing to his. This being in a reign of remarkable weakness (that of Henry the Sixth,) it was by this weakness that they were probably emboldened to make so daring an experiment. The experiment was accordingly made. But though made with impunity, it was not made with success. A parliament there was, which, however impotent and disinclined with relation to any considerable good, was still willing and able to save its members and others from having their estates swallowed up in the gulph which had been thus dug for them.

Contrasted with the beheadings and embowellings, which in the hands of these same functionaries had been ordered for crimes of so much lighter a die, it is curious enough to observe the gentleness of the means employed by the parliament in its opposition to this project: a simple prohibition, and that clothed in the softest language.

In this way it was, that in England the *actual* ends of judicature became, as they are and as they continue to be, so widely different from the *proper* ends of judicature.

In regard to the number of suits, what the proper ends require is, that the number of sincere suits, and applications that are not rash, be maximized; that of insincere suits and applications minimized.

That the number of those that, not being rash, are sincere, be maximized — Why? Because on the part of every person, who in his own opinion, and that of his circle, has a right to a judicial service from a judge, and by the state of the laws finds himself precluded from the obtaining the effect of it, a feeling of oppressedness — an opinion of injustice on the part of the system of judicature — has place.

The number of those that are insincere, minimized — Why? Because if, in the opinion even of him who would institute them, they are unjust, and by reason of the vexation produced by them on the part of the defendant, oppressive, — so everybody else may safely stand assured they are.

In regard to rash suits that are not insincere: as to the number of these also, what the ends of justice require is, that they be lessened. Why? Because by those also vexation is produced. But for the lessening the number of these, arrangements of a nature so severe as those which may and should be employed for the lessening the number of the insincere, should not be employed; lest along with those which are sincere yet rash, those which are sincere and not rash be repressed, and thus the opinion of injustice and insecurity in a correspondent degree diffused. What in this case the ends of justice require is, that maximization be given to the number of those rash suits, in which the burthen of vexation is definitively (by means of compensation) taken off the shoulders of the party in the first instance vexed, and set down upon those of the vexer — the author of the vexation: for, in proportion as these conjoined effects are produced, the quantity of vexation is reduced on the part of the injured class, and with it the extent of the apprehension of the like injustice.

Now as to what, in relation to this subject, is required by the *actual* ends of judicature — required with more or less energy and effect, in every as yet known system of judicature, but with most of all by the English.

In regard to the number of suits, that the number of lawyer-profit-yielding suits, sincere and insincere, be maximized: of that of profitless suits, minimized.

That the number of lawyers'-profit-yielding suits be maximized — Why? Because, — but as to the cause, the case speaks for itself — lawyers' labours and lawyers' profits proportionable.

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That the number of profitless suits be minimized—Why? Because, for every such suit, there would be lawyers' labour (of such as were employed,) and no lawyers' profit to sweeten it.

The lawyers (whose only profit, if any, came from the parties, and could not be compelled to serve the parties) would of course, if the inducement were taken away, leave their books, and escape from the service. Of judges, if paid by the public (and on condition of not receiving anything from the parties,) their interest and inclination would of course prompt them to wish, that of suits thus barren the number should be minimized; but they could not, as the hireling lawyers could, so far as regarded suits in which, if instituted, they would have been concerned, reduce it to nothing.

By law-taxes, profitless suits are reduced, but lawyers'-profit-yielding suits, in a certain proportion, reduced with them. By law-fees, profitless suits are reduced, though lawyer-profit-yielding suits are also reduced; yet in so far as limits are set to rapacity by prudence, the balance on the profit side is increased.

In England, not to speak of other countries, not only at no time has the system of procedure acted upon been in fact directed to the ends of justice, but at no time, by any person concerned in the carrying it on, has any such profession as that of its being directed to the ends of justice been ever made.

With what face, indeed, could they have been, by any English lawyer, laid down as the exclusively proper ones, or so much as simply the proper ones, seeing that the ends uniformly pursued by English judges (who, with here and there the exception of a scrap or two of legislative-made law, have been at the same time their own legislators) are in a state of perpetual opposition to the ends of justice?

Hence it is, that from beginning to end, an English book of procedure *(book of practice* is the name of such a book among English lawyers) presents no other object than a system of absurdity directed to no imaginable good end.

An all-comprehensive code of substantive law, having for its end in view (in so far as the ruling one, and the sub-ruling few, can be brought to admit of it) the greatest happiness of the greatest number, each part of it present, to the minds of all persons on whose conformity to its enactments its attainment of such its end depends:—an all-comprehensive code of adjective law, otherwise called a code of judicial procedure, having, for its end in view the giving, to the utmost possible amount, execution and effect to the enactments of the substantive code:—such is the description of the instruments which the people (in so far as apprised of their most important interests) look for, at the hands of the government:—such are the securities which in a government, in the breasts of the members of which any regard for the greatest happiness of the greatest number had place, would lose no time in bringing into existence.

Such are the indispensable instruments of felicity and security, which the implacable enemies of both—the lawyer tribe, under all its diversifications—will leave no stone unturned to prevent from coming into existence: the *actually existing*, indiscriminate defenders of right and wrong in one house—the *quondum* indiscriminate defenders of right and wrong, now exalted into exclusive defenders of wrong in another house.

It is a maxim with a certain class of reformists, not to give existence or support to any plan of reform, without the consent and guidance of those to whose particular and sinister interest it is in the strongest degree adverse; not to do away or to diminish any evil, but by the consent, and under the guidance of those by whom, for their own advantage, it has been created and preserved.

From this maxim, if consistently acted upon, some practical results, not unworthy of observation, would follow:—

For settling the terms of a code having for its object the prevention of smuggling in all its branches,—sole proper referees, a committee, or bench of twelve smugglers.

For a nocturnal-housebreaking-preventive code,—a committee of twelve nocturnal housebreakers.

For a highway-robbery-preventive code—a committee of highway robbers.

For a pocket-picking-preventive code, (in the physical sense of the word pocket-picking,)—a committee of unlicensed pickpockets.

For a swindling-preventive-code, or say an obtainment-on-false-pretences-preventive code,—a committee of swindlers called swindlers, or of swindlers called Masters in Chancery, including the Master of the Rolls; or a committee, bench, board, or jury—no matter which the appellation, so the apostolic number, twelve, be retained, composed *de medietate;* half of swindlers unlicensed, and unentrusted with the power of extortion—the other half licensed, and invested with the power of extortion, the *jus extorquendi*, the *jus nocendi*, in its most irresistible and profitable shape.

For a female-chastity-securing code,—a committee of twelve ladies-procuresses.

No housebreaker has an interest in preventing the abolition of housebreaking, no highwayman in preventing the abolition of highway robbery, no pickpocket in preventing the abolition of pocket-picking, no sinecurist or Master in Chancery, or other swindler, in preventing the abolition of the practice of obtaining money by false pretences, no lady-

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procuress in preventing the abolition of female unchastity: — no such practitioner, male or female, stands engaged to resist the abolition or curtailment of his or her means of livelihood, by any interest comparable in point of magnitude and intensity with that which an English judge has in preserving the rule of action from any change from which human misery would be lessened, and his own profit, which with so much ingenuity and success has been so intimately and inseparably interwoven with it, and rendered proportionable to it, reduced.

The Westminster-Hall common-law judges, in different groupes — in some instances collectively, in others severally—(shared among them as they can agree,) possess and exercise a power of making law—of making that which has the bad effect, without any of the good effect of law, *ad libitum*, without any controul but that of a legislature, which is in league with them by a community of sinister interest, and leaves to them the charge of exercising depredation and oppression, in cases in which fear or shame would prevent its operating to that effect by its own hands.

Lord Tenterden dismisses unpunished (indeed, how could he have done otherwise?) an extortioner, with whom he has a fellow feeling, with whom he is in partnership, whose profit is his profit. This fact has been held up to the view of Mr. Peel, and Mr. Peel will do nothing without the advice and consent of Lord Tenterden, whose wisdom, magnanimity, disinterestedness, and public spirit, he can never sufficiently admire.

Upon the money which, — instead of being secured to and divided between the distressed debtor and his frequently no less distressed creditor, the gaoler (dignified with the title of Marshal) of the prison called the King's Bench prison, — this gaoler can contrive to squeeze into his own pocket, depends the value of the place to the possessor, and thence to the patron, the Chief-justice of the said King's Bench.

Into the mind of a Member not in office, suppose any such conception to have found entrance, as that the money of a debtor would be more beneficially disposed of, if divided amongst his creditors, than if divided between the Marshal and the Chief-justice of the King's Bench, — and to move for leave to bring in a bill for this purpose — what, in such a case, would be the course taken by Mr. Peel? He would cause it to be understood, that if the bill were entrusted to him he would take charge of it: a proposition, of the advantageousness of which it would not be possible for the member, be he who he may, not to be persuaded. The bill is now in Mr. Peel's hands. What, then, if he acts with any consistency, will he do with it? He will recommend it to the care of Mr. Jones* and Lord Tenterden, and will be guided altogether by their invaluable assistance and advice.

A man, indicted for manslaughter by driving a load over the body of the deceased, was acquitted. Why? because he did not do the act? No: but because by Mr. Nobody-knows-who, who drew the indictment, the condition of the *cavalry*, in respect of sex, and aptitude for marriage (nomenclature is in this instance an operation of the most perilous delicacy,) had been averred; and by those who should have proved it, had not been proved. By the care of Mr. Peel's sublaborators, in one of his bills, a clause had been inserted, by which the necessity of the averment in question, and proof made of it, would have been saved. But by the wisdom of a majority of those wise men of the West, it had been perceived, that by the omission of matter so indispensable in the eyes of the common law, "*too great a laxity in pleading would have been introduced.*"

One reason had been alleged why the defendant, if a murderer, should not suffer as such: and the reason was, that by the drawer of the indictment, the nature of the road had not, in point of law, been explained, —whether it was a king's highway, or what else it was. This objection, formidable as it was, was overruled by the learned judge, Lord Chief-justice Best; whose liberality and sense of justice stood thus conspicuously manifested.

But the objection about the condition of the cavalry was too material and too strong, even for his Herculean shoulders. This objection was pronounced by him a fatal one: to have found it obviated by a clause in an act of Mr. Peel's, had been his hope; but alas! on inspection, the clause was not be found.

Thus it is, that by the deliberate, and so recently declared judgment — that judgment a unanimous one, of the twelve Wise Men of the West — it is conclusively established, that (not to speak of other functionaries of the law) the power of granting effectual pardon to all criminals — murderers in particular, not excepted — belongs incontestibly to every person by whom the function of penning the instrument of accusation is performed.

With this licence, wanting to himself is every murderer, who, by his murders or otherwise, having provided himself with the money, omits to offer to the draughtsman whatever sum may be requisite, to the insertion of the mercy-administering surplusage: wanting to himself, disrespectful to the luminaries of the law—the twelve judges—is the draughtsman by whom so advantageous an offer is refused. What danger for him can there be, from the acceptance of it? So many of these omis-

* The late Marshal of the King's Bench prison.

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sions as there have been in time past, none of them producing any suspicion of sinister design: so easy, so frequent, such omissions *without* sinister design, —who shall be uncharitable enough to pronounce intentionality in any future instance, whatever it be?

By the functionary in question, true it is, that in consequence of the omission, a good sum of money, say a thousand pounds, has been received.

But from thence does it follow that it was really his intention that guilt should escape? Forbid it, candour!—forbid it, justice! The judges, are they not ministers of justice? This draughtsman, is he not a minister of justice likewise?

Let but a man be the minister of justice, and whatsoever be the quantity or quality of the mischief, in the production of which he is instrumental, — whatsoever be the quantity of the money which he gains by its being produced, — (in such sort, that were not the mischief produced, the money would not be received:) it is not to be supposed that it was his intention that mischief should be produced; it is not to be supposed that, whatsoever be the money gained by producing it, he will ever intentionally contribute to the production of it in future.

Captain Macheath, when, pistol in hand, he said to the passenger, "Give me your purse or you are a dead man," and he received the purse with five guineas in it accordingly, — was it his intention to receive the money, and convert it to his own use? Yes: for his style and title was Captain Macheath. But suppose his style and title had been Mr. Justice Macheath —or suppose, that after having been convicted of the robbery, instead of the gallows he had been raised to the bench, —would he, even in the last case, have been guilty? — would it have been his intention either to have received the money, or to have shot the passenger, in the case of his not receiving it? Oh no: the patent of appointment would have *relation backwards:* nothing more easy, nothing more conformable to precedent. The King can do no wrong upon the throne. The King's judge can do no wrong upon the King's Bench — can he, Lord Tenterden? — can he, protector and partner of the tipstaff?

CHAPTER III.

PROCEDURE — ITS RELATION TO THE REST OF THE LAW.

A PROCEDURE CODE is an accessory code, which, as we have seen, has for its end in view, and occupation, the giving execution and effect to a correspondent principal code.

Hence comes a natural supposition: the substantive code should, as mathematicians say, be given, or the adjective can have no meaning; the substantive being throughout a necessary object of reference.

To a certain extent and degree, this is correct and undeniable. To a certain extent it does not apply. If it did apply to its whole extent, this work would, from first to last, be unintelligible and useless.

The procedure code, in so far as it is clear it ought to be, has for its purpose, and end, and occupation, two things: the exercising, for the avowed purposes mentioned in the substantive code, powers of all sorts over persons and things; and, in the next place, coming at the truth of the case in regard to matters of fact, to wit, such matters of fact as are necessary to give warrant and justification to the exercise of those same powers — say means of execution and means of proof, or, in one word, evidence. Of these two desiderata, the first mentioned is the first in the order of design, and in the order of importance. But in practice, that which is to constitute the warrant, must precede the operation for which it is to afford the warrant.

Here, then, comes the line of distinction— the distinction between that part of the proposed system of procedure, which may be given without the previous exhibition of any part of the system of substantive law, and that part which cannot. The means for coming at the truth, as to matters of fact, are the same in all cases: the means for obtaining and exercising the powers necessary to the giving execution and effect to the ordinances of substantive law, are the same in all cases.

But of this general application of machinery, different ordinances of substantive law require the application of different engines or instruments to be brought into exercise. On which occasion, which instrument shall be brought into exercise, and how applied— this will depend upon the particular portion or article of substantive law, to which, for the purpose of giving effect to it, application is to be made of it.

Taking possession of a man's body, for the purpose of securing, on his part, compliance with ordinances — ordinances of the substantive law, and thence, those of adjective law employed in giving effect to them. This power, once possessed, is in its nature, applicable to any one purpose as well as any other: to the exaction of service in any shape — to the infliction of punishment in any shape.

So in regard to taking possession of a mass of property: to the above purpose is added, in this case, the allotment of it, in kind or in value, in satisfaction of debts due.

So in regard to the means of communication — of communication between person and person — of communication between persons and things, whether for the purpose of exe-

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cution, or the purpose of proof — the catalogue of these will require to be a perfect one.

In a word, on looking over the titles of the several chapters of this work, it will be seen, that the points therein respectively brought to view, require all of them to be settled for every extensive substantive code that can be imagined.

But different judicial services — judicial service in different shapes — require so many different operations to be performed, for the application of the general apparatus of powers to their several particular purposes. Different modes of punishment require so many different operations, or sets of operations, to be performed in the application of the general powers over person, property, reputation, and condition in life—to be applied to the purpose of inflicting the particular species of suffering allotted to each species of offence. These, then, must all be *given*, ere the Procedure Code can be complete.

In the present outline, that which can be done, and accordingly is done, is the bringing to view the course which it is supposed is the best that can be pursued, for the purpose of giving execution and effect to the whole system of substantive law — execution and effect down to that stage in which the execution in each instance (in the instance of each service, and in the instance of each punishment) is actually to be done; the *tenor* of the definitive decree must be accommodated and adapted to the particular service — to the particular punishment.

On this occasion will be seen one broad feature, by which the here proposed code will be seen to stand distinguished from all codes that ever were established. If the one course here chalked out be the straight one, all those others will be recognized to be composed of aberrations, exhibiting variety of absurdity, and to the unhappy people productive of variety of wretchedness.

Another corollary, of which a general intimation may here be given, is the comparative smallness of the diversity between the course of procedure required for the giving execution and effect to the non-penal branch of substantive law, and the course requisite in the case of the penal branch. For giving appropriate execution and effect to the non-penal branch, appropriate proof must be obtained and employed, and appropriate means of execution provided and applied; and with little if any difference, these will serve as well for penal as for non-penal cases.

In the penal cases of the greatest severity, reluctance as to compliance on the part of the defendant will be greater than in any non-penal case: and for surmounting reluctance, adequate provision, so far as the nature of the case admits, must in every case be made. The reluctance will be as the affliction. But in cases decidedly non-penal, the affliction may, with little exception, be as great as any which, in the far greater number of penal cases, it will be found necessary to produce. Be a man's property ever so vast, it is frequently, for a purely non-penal purpose — satisfaction to creditors — necessary to divest him of it; and many a man, rather than undergo this affliction, has doomed himself to, and actually suffered, imprisonment for life — for life, and that a very long one.

As to the aberrations — those aberrations by which the course of procedure has been rendered a course of such afflictive intricacy — they will be found all springing from one source, — the opposition of the actual ends of judicature to the ends of justice — the opposition between the interests of those by whose will that course has been regulated, and the interest of the people whose destiny has been disposed of by it.

By this one circumstance, every anomaly will be seen to be accounted for — every object rendered plain and clear: without it, every object will be obscure — the whole system will continue to present to view the same chaos as at present.

Doubtless, without a continual eye to the mass of substantive law in all its branches, no such outline of the course of procedure as the present could have been delineated: but in regard to the objects which it was necessary should be kept in view by the writer, it was not necessary that they should be presented to the view of the reader.

In a case of civil procedure, the previous existence of any offence is not supposed: what is supposed is the existence of a right on the part of some individual to apply to a court of justice, requesting the court to confer on him another correspondent right; but by conferring on the individual so applying the right so applied for, it can do no otherwise than create, on the part of some other individual, a correspondent obligation or mass of obligations: if the individual on whom the obligation in question is thus sought to be imposed, submits voluntarily to have it imposed on him, there is no lawsuit in the case: so, likewise, if without inquiring to know whether he is willing to receive it, the judge imposes it upon him of course.

But if the case be such that the judge, before he proceeds to impose the obligation so required to be imposed, causes application to be made to the party in question, to know whether he be content to have it imposed upon him, and upon such application so made to him, he refuses to submit to have it imposed on him, unless upon further order to be pronounced by the judge (upon hearing the reasons for and against the imposition of the obligation thus contended against) — in such case, a cause, suit, or litigation takes place,

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and such cause, suit, or litigation, is termed a civil one. In this case, as in the case of a penal one, an offence is still supposed as liable to be committed: nor without the idea of delinquency can this case any more than the other be understood; for in this case a judgment, with an order thereupon grounded, is supposed, in the event of the plaintiff's gaining his cause, to be issued by the judge. But to the idea of a judicial order, the idea of an act of delinquency is necessarily annexed; for the order has no force, if any act performed in breach of such order be not considered and treated as an offence.

Both an act by which a penal suit is commenced, and an act by which a civil suit is commenced, suppose an act of delinquency or offence: the difference is, that the acts by which a penal suit is commenced, suppose an offence committed already; whereas an act by which a civil suit is commenced, does not suppose any offence committed already—does not suppose any offence as being about to be committed for certain: it supposes only that an offence will eventually be committed, if, upon the judge's having created, as above, the obligation corresponding to the right required to be conferred, any act in breach of such obligation should come to be committed.

We proceed to the consideration of the several ends of procedure considered in respect of the penal branch of it. The ultimate ends of penal procedure are two. Of these, the main and positive end is the infliction of the punishment in question, including the administering of the several species of satisfaction attached to the lot of punishment in question, in the cases where mixed species of satisfaction respectively have place. The negative ultimate end is the non-infliction of the lot of punishment in question in each case, as the individual in question, in the event of his not having committed or been a partaker in the alleged individual offence, is entitled to have this protection of the innocent.

Collateral or incidental ends of penal procedure: the avoidance, as far as is possible, of the several inconveniences which, in a greater or less degree, are inseparable from the course of action by which a penal suit, action, or prosecution, as it is called, is carried on. These inconveniences, considered in respect of their origin, may be termed by one general or common appellation, juridical or legal vexation.

Of juridical vexations, the principal modifications may be enumerated as follows:—

1st, Consumption of time, understood in a way supposed to be unpleasant.

2d, Confinement in respect of place; obligation of being in some place in which it is unpleasant or prejudicial to a man to be; obligation of not being in some place in which it would be pleasant or advantageous to a man to be.

3d, Pecuniary expense, loss, or charge.

4th, Anxiety of mind, a pain grounded on the apprehension of being subjected to one or more of the modifications of inconvenience above mentioned. Of these several modifications of forensic vexation, the pecuniary expense is the most prominent; and this partly because the existence of it, in a degree worth regarding, is capable of being more precisely ascertained than in any of these other cases; partly because the amount of it is capable of being more exactly measured.

These inconveniences, or some of them, have a mutual tendency to increase and generate each other: confinement in respect of place will oftentimes be productive of pecuniary expense; pecuniary expense, or the apprehension of it, will be productive of confinement in respect of place, viz. in as far as, for the purpose of saving the expense, a man either stays at home, instead of going a journey, or goes a journey, instead of staying at home as he would have done otherwise.

The avoidance of delay is termed an end of the second order; because delay itself, though indisputably an inconvenience, is not in its effects distinguishable from the inconveniences of the first order—the inconveniences to which the several ends of the first order respectively bear reference; for into one or other of these same inconveniences it may in every case be resolved.

In speaking of delay, it must all along be understood, that to the business of the branch of procedure in question, as to every other business, a certain portion of time is altogether necessary; by delay, therefore, neither more nor less is understood than the consumption of any portion of time over and above the portion of time absolutely necessary—the portion of time that would be sufficient for the accomplishment of the several ends of procedure in their respective greatest degrees of perfection, whatever it may be.

So far as the delay continues, so far the main positive ultimate ends of procedure remain unaccomplished.

From delay, again, in certain cases, may arise a result contrary to the negative ultimate end of procedure; in other words, from delay may arise the conviction, and thence the punishment, of the non-guilty; as for example, by the deperition of evidence necessary to the proof of innocence.

From delay may arise forensic vexation in any of its already enumerated shapes.

The avoidance of precipitation may be ranked as an end of the second order, for the same reasons that apply to the case of delay. But the mass of inconvenience of which it is liable to be productive, is upon the whole even less considerable, or at least less diversified. In the case of delay there is a certain inconvenience; for so long as it lasts,

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there is a denial of justice: in the case of precipitation, there is no inconvenience, but what, in the first instance, is contingent. The inconveniences appertaining to precipitation are no other than the disaccomplishment or frustration of one or other of the two ultimate ends of procedure; in other words, they can scarcely consist of anything else but either the non-conviction of some one who is guilty, or the conviction of, and consequent punishment of, some one who is not guilty. Supposing it to be productive of either of these ultimate inconveniences, precipitation can scarcely be productive of any one of the collateral or incidental inconveniences, viz. local confinement and expense, unpleasant occupation, anxiety of mind: on the contrary, the effect of it is to reduce these several collateral inconveniences to a quantity inferior to that in which they would exist otherwise. In this point of view, so far from being productive of inconvenience, it is productive of advantage — an advantage which would be clear and desirable upon the whole, were it not for the chance of danger of which precipitation is productive, viz. the danger of giving birth to one or other of the two abovementioned ultimate inconveniences — the inconveniences corresponding respectively to the two ultimate ends of this branch of procedure.

The idea of precipitation may be thus fixed and explained. A certain quantity of time is supposed to be necessary to give room for the several actions and reflections, on the part of the several individuals concerned, which are considered as necessary to afford to the judge the best chance for rendering justice; *i. e.* for the accomplishment of the two ultimate ends of procedure above mentioned.

Precipitation is considered as taking place, when in any part, anything is supposed to be struck off or defalcated, from the supposed necessary length of time. Thus, if a cause be supposed to be of that importance, that after the hearing of all the proofs, a less time than a week cannot, it is supposed, be sufficient, on the part of the judge, to be employed in the consideration of them, and the time employed by the judge in the consideration of them is no more than a single day; in such cases the judge must, by the supposition, be deemed chargeable with precipitation. If, then, in consequence of such supposed precipitation, the judgment actually given by the judge is repugnant to one or other of the ultimate ends of justice, in this case the mischief correspondent to such ultimate end is actually produced. But in the opposite case, *i. e.* if the decision of the judge be conformable to the ultimate ends of justice, no mischief at all is produced by precipitation: the contingency is not reduced to act; on the contrary, so far from being productive of inconvenience, the supposed precipitation is productive of advantage upon the whole, since by virtue of it as much time as corresponds to the delay thus saved, is saved.

Thus, again, if the time allowed by the judge for the appearance of a witness is but three days, and the time, which a person whose opinion is supposed to be the standard, would fix upon as necessary for the purpose, is *four* days, the judge would of course, in the opinion of such persons, stand chargeable with precipitation. If, then, the witness accordingly, for want of sufficient time, fail in making his appearance within the time in question, and for want of his appearance an unjust decision is given by the judge — a decision, contrary to one or other of the two ultimate ends of justice; — in such case, the contingent inconvenience attached to the supposed precipitation, is converted into a real one. But if, notwithstanding the supposed precipitation, the witness does make his appearance within the time, and that without any forensic vexation produced, on the part of him or anybody else (for example, without injury to his health, or to the value of his time, or increase of expense,) — in such case, the supposed precipitation turns out to be no real precipitation, or at least not to be productive of any ultimate inconvenience, nor of any prejudice to any of the ends of justice. On the contrary, the consequence, and only consequence of it, consists in a real and positive convenience, since a portion of delay, to the amount of a day, is saved.

However, even on this supposition, a certain degree of inconvenience may be produced by the precipitation, upon the whole. Since the idea of a judge, whose conduct is marked in general with precipitation, cannot but be productive of a general alarm, for want of the requisite measure of delay and consideration: each person conceiving himself liable to appear in the character of a suitor, will become apprehensive of seeing the ends of justice contravened to his prejudice: he will be apprehensive lest, if he become an accuser, the party whom he accuses be, for want of due consideration on the part of the judge, acquitted, though guilty; lest in the event of his coming under accusation, he may, for like want of consideration on the part of the judge, be convicted.

If the enumeration, made as above, of the several objects to be aimed at in the character of the ends of procedure, is proper as far as it goes, and complete, the several ends will furnish so many *principles*, by which the propriety of every regulation, proposed in the character of a regulation of procedure, may be tried.

Should any consideration present itself, which, serving in the character of a reason to evince the utility of the provision to which

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it is thus applied, shall at the same time appear incapable of being ranked under any of the above principles: in other words, though good in itself, *i. e.* serving to evince the utility of the provision in some other respect, it should be found not to be of a nature to evince the subserviency of the provision in question to any one of the above ends; — in such case, the enumeration of these ends — the enumeration of the correspondent principles — will in so far turn out to be incomplete; on the contrary, if no such independent reason be to be found, it follows that in this single chapter is contained a test by which the propriety of every imaginable provision of procedure may be tried and determined. And in that case, the pains taken in the investigation of them, and in exhibiting the nature of their relation to each other, will not have been ill bestowed.

This catalogue of ends, is it correct and complete, and the relation between the several articles accurately made out and established? The foundations of the rationale of procedure are then laid, and laid for ever. A standard is constructed, by which the propriety of every rule and disposition of law, in this behalf, that has anywhere been established, or can ever come to be proposed, may be tried and determined. A rule of established practice, established anywhere, in this behalf, is it defective in any respect, or supposed to be defective? It must be in respect of its tendency to produce some of the inconveniences corresponding to the above ends. A rule — is it proposed anywhere, as promising to occupy a useful place in the code of procedure? Its utility, if it possesses any, must consist in the tendency it has to be subservient, in some distinct and assignable way or other, to the attainment of one or more of those ends; to the prevention or diminution, in some way or other, of some one article or articles in the corresponding list of inconveniences.

A system of procedure, with what skill soever directed, will be liable, notwithstanding, to give birth to a variety of mischiefs, or say inconveniences. These mischiefs, various as they are, will however be found all of them reducible to the following heads: —

In the penal branch,

1. Impunity of delinquents.
2. Undue punishment, viz. punishment of non-delinquents, or punishment of delinquents otherwise than due.

In the non-penal branch,

3. Frustration of well-grounded claims.
4. Allowance of ill-grounded claims.
5. Expense.
6. Vexation.
7. Delay.
8. Precipitation.
9. Complication.

So many mischiefs as are liable to be found in a system of procedure, so many mischiefs to be avoided in every such system: so many mischiefs, the avoidance of which may in any such system be considered as respectively constituting so many ends to be kept in view.

If the catalogue of these mischiefs be complete, no provision that can be proposed can be entitled to a place in any such system, but in so far as it can be shown to be conducive to the attainment of one or more of these several ends.

If, at the same time, it is seen to be more conducive to one of these ends, than to another or others, to which it is sure to be repugnant, a comparative estimate will then be to be made; and for the purpose of this estimate, one point to be ascertained will be the comparative importance of the end or ends on both sides, *i. e.* of the mischiefs concerned on both sides; in the next place, the degree of conduciveness on the part of the provision in question with reference to each such end.

In casting an eye over the catalogue of these mischiefs, some may be observed, the avoidance of which — the complete avoidance — is, in conception at least, a possible result: to this head may be referred the four first articles, and the eighth, — impunity of delinquents — undue punishment — frustration of well-grounded claims — allowance of ill-grounded claims, and precipitation. Others there are, of which not even in conception can the exclusion appear possible: to this head belong the articles of expense, vexation, delay, and complication. Of these, it will be seen immediately, that to a certain degree they are inseparably and essentially attached to the business of procedure: in these instances, the object is not to exclude them altogether, that being plainly impossible, but on each occasion to reduce their respective degrees or quantities to minimum, to the lowest pitch possible.

In looking over the same list again in another point of view, another remark that may be made is, that in some of the instances the result thus given as mischievous is mischievous in its own nature. To this head belong, evidently enough, the first six articles — impunity of delinquents, undue punishment, frustration of well-grounded claims, allowance of ill-grounded claims, expense and vexation. In other instances, the result, though still indubitably mischievous, can hardly be said to be so in itself; it would not be so, were it not for the property it has of giving birth, or its tendency at least to give birth, to some one or more of the articles in the list last mentioned: to this head belong the other remaining articles — delay, precipitation, and complication.

Among the mischiefs of the first order, two, and two only, are such, that the ends corresponding to them can be said with propriety to constitute the direct and ultimate ends of the system of procedure. These are, in the

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penal branch, impunity of delinquency: in the non-penal branch, frustration of well-grounded claims. In the penal branch, the avoiding to administer punishment when undue, is certainly an end of very high importance, and altogether necessary to be attended to with unremitting and anxious care. It cannot, however, with any propriety, be stated as constituting an ultimate, a primary, a direct end of the system of procedure. Why? Because if there were no system of procedure at all, this end would be but the more completely and effectually accomplished.

This same observation may, it is equally evident, be extended with equal propriety to four other of the above ends — to that which consists in avoiding to give allowance to ill grounded claims, and to those which respectively consist in avoiding to give birth to those unhappily inseparable accompaniments of every system of procedure, viz. expense, and vexation in other shapes.

The two ultimate ends — avoidance to produce or suffer impunity on the part of delinquents — avoidance to produce or suffer frustration of well-grounded claims; — these two ends, though thus for the sake of unity, symmetry, and analogy, expressed in a negative form of words — in a phrase of a negative construction — are capable of being expressed more naturally and perspicuously by a phrase in the positive form: accomplishment of the punishment of delinquency — effectuation of well-grounded claims.

In the penal branch, the application of punishment, with its attendant masses of satisfaction in the case where the offence imputed has really been committed; the avoiding the employment of such coercive measures in every case where the offence has not been committed: in the civil branch, the collation of the right demanded, in the case where the collation of it is required by a correspondent provision of the substantive law—the collation of such right, and therewith and thereby, the creation of the correspondent group of obligations; the avoiding the employing those same coercive measures, in the case where the creation of the correspondent right is not required by the substantive law: —

All these measures, both in the penal branch and in the civil, the observance of all these conditions, is comprised in one expression, viz. *rendering justice*—taking that course in every case which coincides with the track marked out beforehand by the finger of the substantive law.

It being established, that the proper end and object of the system of procedure is to render justice as above explained,—the justice that will naturally be understood as that, the rendering of which is the end or object thus spoken of — is the real justice of the case: meaning by real justice, that which is such in contradistinction to whatever else may appear to be such — in other words, as before, that the course taken shall be what really is conformable to the indication given by the correspondent portion of substantive law, in contradistinction to what, if there be a difference, is in appearance, and but in appearance, thus conformable.

The distinction thus made wears the appearance of subtlety, and even useless subtlety; but when applied to practice, it will, besides being explained, be shown to be, in more points of view than one, of very considerable importance.

It will be seen, in the first place, that between real or abstract justice, and apparent justice, there is in many cases a very palpable difference: in the next place, that when they fail of coinciding, it is rather apparent justice, than real and abstract justice, that is the direct end, and immediately important object of the system of procedure.

In another work,* I have already had occasion to hold up to view, as a distinction of cardinal importance, the distinction between mischief of the first order and mischief of the second order; and so in like manner of good, in so far as that result is among the effects of the action in question, instead of evil as before. But it is only good or evil of the first order that constitutes the effect produced by *real* justice: the good and evil of the second order depends wholly and solely (speaking of immediate dependence) upon *apparent* justice. If the decision given, being a decision by which a man is subjected to punishment, be conformable to apparent justice, — in other words, if the universal persuasion, the persuasion entertained by everybody to whose notice this case presents itself, is that the man was guilty, — in such case, though by the supposition the decision is contrary to real justice, and though, in virtue of the suffering of the party punished, mischief of the first order is produced, yet the mischief remains barren; no mischief of the second order, or alarm, is, by the very supposition, produced by it.

Suppose, on the other hand, the party accused is really guilty of the offence: a decision is given, pronouncing him so, and he suffers accordingly: the decision is in this case, by the very supposition, conformable to real justice. But if it be unconformable to apparent justice, in other words, if according to universal persuasion the man is looked upon as not guilty, a mischief of the second order is produced — an alarm; and that alarm by the supposition is as strong as if the party, thus looked upon as innocent, had been so in reality.

In the same way, *mutatis mutandis*, the distinction between real and apparent justice may be applied in the non-penal branch of procedure. The distinction being thus ex-

* Principles of Morals and Legislation. See Vol I. p. 69, *et seq.*

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plained, it remains now to bring to view, by way of example, a case, or a few cases, in which it is realized, and from thence to show, (what however will appear pretty clearly without much showing,) the importance and utility of this distinction in practice.

When, having been prosecuted, a man who in the general estimation of the public appears to have been guilty, is acquitted; by the observation of such acquittal,—by such impunity as in that case is said to be manifested by it, a mischief of the second order, an alarm at any rate, is produced.

A general apprehension is entertained of similar manifestations of delinquency, and similar mischiefs, as the probable result of such similar offences. Offences are apprehended, in the first place, from the agency of the individual himself, thus triumphing in impunity, and encouraged to go on in the path of guilt by the experienced receipt of the profit of the offence, clear of the punishment endeavoured by the substantive law to be attached to it: offences of the like description, or indeed in a greater or less degree of all descriptions, on the part of other individuals — of all individuals who, standing exposed to temptation, may by the observation of the impunity enjoyed in the instance in question, be disposed to yield to it. Such are the evil effects which, in a greater or less degree, take place, as often as a man who, in the general opinion of the public, appears to have been guilty, is observed to have escaped punishment.

If the case were such, that as well in the case of guilt, as in the case of innocence, reality and appearance always went together; — in that case, no such spectacle of impunity could by the supposition ever be exhibited. But in fact, this want of coincidence between real and apparent justice is observed to take place in but too many instances.

On this occasion, the repugnance admits of two evils, both equally conceivable. One is, that the party appearing in the eye of public opinion guilty, shall notwithstanding, at the conclusion of the suit, have been treated by the judge as innocent, in a manner unconformable to justice; in other words, shall have been acquitted.

The other is, that the party appearing in the eye of the public innocent, shall notwithstanding have been treated by the judge as guilty; in other words, shall have been convicted in a manner unconformable to justice.

Of these two cases, the former is a case that, as will be seen, is but too frequently realized. A variety of causes, each of them adequate to the production of the effect, and accordingly each of them very frequently producing it, will be mentioned further on.

The other is a case which, though not absolutely without example, is happily, there is reason to think, very seldom realized.

In regard to impunity, that the case of a man who, though guilty, and as such prosecuted, has notwithstanding been acquitted, is a frequent one, no person whatever — no judge, no advocate, no person, how partial soever in his affection to the established system, will ever attempt to deny: the utmost that any such person could ever think of affirming, and even this is more than persons so situated will in general be disposed to affirm, is — that when a man has thus been treated as innocent, and as such acquitted, he has accordingly been innocent in reality; and that the decision, though apparently unconformable to the disposition of the substantive law, was in reality conformable to it — that the decision, though not conformable to apparent justice, was conformable to real justice. The argument thus supposed, would very seldom indeed be found conformable to the fact; but what is material to the present purpose is, that even though it were conformable to the fact, it would not be sufficient for the justification of the system of procedure, in which the contrariety in question were manifested. That a system of procedure be good — that it be well adapted to its proper end, it is not sufficient that the decisions rendered in virtue of it be conformable to real justice; it is necessary that they should be conformable to apparent justice: to produce real justice, the only true way is to produce that which shall in the eye of public opinion be apparent justice. In point of utility, apparent justice is everything; real justice, abstractedly from apparent justice, is a useless abstraction, not worth pursuing, and supposing it contrary to apparent justice, such as ought not to be pursued.

From apparent justice flow all the good effects of justice — from real justice, if different from apparent, none.

On the other hand, in this same distinction may be observed a circumstance which operates in some degree as a remedy to a great deal of injustice — injustice which will be seen to be no less entitled to the appellation of real, than apparent injustice. In some cases, in some countries, it will happen, from causes that will be elsewhere mentioned, that although particular instances of injustice, at once real and apparent, are manifesting themselves every day, yet, from the operation of these causes, a considerable degree of confidence will notwithstanding be entertained in the system of procedure, as having a general tendency to produce, in the decisions given under it, a conformity to the prescriptions of justice. In this case, the opinion, though erroneous, and founded on prejudices capable of being pointed out, will, in the way above spoken of, be productive of salutary effects. Were the system viewed in its genuine colours, the alarm produced by it — the alarm of inse-

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curity—would be extreme and universal. But by the effect of this prejudice the alarm is lessened; the mischiefs resulting from the imperfection of the system cannot, be the prejudice ever so strong, escape wholly from observation, but the mischiefs, instead of being ascribed to their real cause, the imperfections of the system of procedure, are ascribed to the nature of things. That justice very frequently fails of being done, is a truth too palpable to be disputed—too palpable to pass unobserved, or unacknowledged; but the notion is, that whenever it can be done, it is done; that if in any case it fails of being done, it is because in that case, in the nature of things, it cannot be done. The confidence in the system remains in a manner entire—as entire as if its title to that confidence were ever so real and indisputable.

CHAPTER IV.

JUDICIARY ESTABLISHMENT.

THE arrangements in this proposed Procedure Code bear reference to a correspondent judiciary establishment, without which, execution and effect could not be given to them.

For the list of arrangements proposed for the establishment of it, see the Chapters in the Constitutional Code, from XII. to XXVII. inclusive.

Of the leading features of the system of arrangements, the following summary intimation may in this place, notwithstanding the scantiness of it, be not altogether without its use.

Exceptions excepted, and those few and narrow, and for special causes:—

1. Number of judges in a judicatory, in no instance more than one. Judicatories, each of them single seated. Principle, in one word, the principle of single-seatedness.

2. To the cognizance of every judicatory belong all sorts of cases, or say suits. Principle, in one word, the principle of omnicompetence.

3. From every judicatory, in every case, appeal lies, to one other judicatory, and no more. The judicatory appealed from, the immediate judicature: judicatory appealed to, the appellate judicatory.

4. Attached to every judicatory are—1. A registrar; 2. A government advocate; 3. An eleemosynary advocate: the eleemosynary advocate, for support to the interests of the otherwise helpless, among suitors.

5. Presiding each over a certain number of immediate judicatories, are appellate judicatories: the number, such as the experience of the need manifested of their service, shall have indicated.

In federal commonwealths and countries in which the population is thin, distance great, and means of communication comparatively rare, it may be of use that they be scattered over the country; and where sub-legislatures have place, for every sub-legislature, and in the town which is the seat of it, there should be an appellate judicatory: and thus, by the efflux of suitors to the judicatory, and of members and other functionaries of the legislature, a good public, filled with appropriate aptitude—moral, intellectual, and active—may in each of these seats of business be created and preserved.

But in England, on the contrary, where the communication is so prompt, and the occasions and means so abundant, the demand for a number of appellate judicatories in so many places distant from each other, seems hardly to have place. The metropolis, the immediate centre of all business, which at all times will be sure to afford a public, with the aptitude of which no other town can bear comparison, may serve for all of them.

6. To every judge belongs the power of locating deputes, permanent and occasional, in number to which no present limits can be assigned. To the judge-principal belongs a salary in possession: to each judge-depute permanent, the office of judge-principal, with the salary annexed to it in prospect. By this means, the quantity of judge-power, using the term in the same sense as in the cases of clerk-power and horse-power, will be at all times in sufficiency, at no time in excess. A man will not accept the appointment of judge-depute, in the case where the number of persons already in that situation reduces the prospect of succession to a quantity too small to produce the desire. A judge-depute is as it were an apprentice to his principal, learning his trade in the course of his service.

7. As to the office of judge, so as to the several offices of registrar, government advocate, and eleemosynary advocate, is the power of deputation as above allotted.

8. When time has given room for judge-deputes in sufficient numbers (each with sufficient length of service) to come into existence, no person will be capable of being located as a judge-principal, who has not, for a certain number of years, officiated as judge-depute.

9. At the same time, no person who has ever acted in the capacity of professional lawyer, will be capable of being located in the situation of judge.

10. In every judicatory, to serve as a check upon arbitrary power in the situation of judge, care will be taken to secure the presence of a good public, or say committee of the public-opinion tribunal. Elementary classes, and individuals entering into the composition of this committee, are these:—

(1.) Suitors waiting for the calling on of their respective suits.

(2.) Probationary lawyers, serving in this

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seat of judicature a quasi-clerkship, or apprenticeship, — duration of it five years, — during the two last of which, they are admitted to advocate the suits of helpless litigants, or would-be litigants rendered helpless by non-possession of the money necessary to the defraying of the expense.

(3.) The government advocate.

(4.) The eleemosynary advocate, *i. e.* the advocate appointed by government to give assistance on the side of litigants, and would-be litigants rendered helpless by relative indigence as above.

(5.) The quasi-jury, on the occasion of quasi-jury hearings.

11. The elementary functions, necessarily exercised on the occasion of every judicial inquiry, are — 1. The auditive; 2. The inspective; and, 3. The lective.

12. The *helpless litigants' fund*, or fund for defraying the expense necessary to effect the forthcomingness of such evidence as the suit may happen to furnish: a fund partly composed of fines, or say mulcts, inflicted for pursuits accompanied with temerity or evil consciousness.

CHAPTER V.

PROCEDURE — ITS SUBJECT-MATTERS.

As in the case of substantive law (constitutional law, penal law, and non-penal law included,) so here, in the case of procedure law, the subject-matters of legislation are distinguished into —

1. Persons.
2. Things immoveable.
3. Things moveable.
4. Money.
5. Occurrences.

Persons are distinguishable, for the purpose of the procedure code, into functionaries, and non-functionaries.

Functionaries into judicial functionaries, or non-judicial, or say extra-judicial functionaries. For a list of these functionaries, see Constitutional Code, Chap. XII. Judiciary collectively.

As to things immoveable, and their distinctions, see Constitutional Code, Chapter IX. Ministers collectively, § 7, Statistic function.

So, as to things moveable.

So, as to money.

So, as to occurrences.

Occurrences may be distinguished into judicial-procedure-affecting, and miscellaneous.

As to the judicial-procedure-affecting occurrences, they will be found comprisible under one or other of the four heads following: —

1. States of things.
2. Actions, or say operations, at large.
3. Actions, or operations, consisting in the utterance of judicial formularies.
4. Judicial formularies, or say instruments.

By a judicial formulary, or instrument, understand a written or quasi-written discourse, uttered on a judicial occasion, and for a judicial purpose, by some person or persons belonging to the list as above, of actors in the judicial drama, or on the judicial theatre.

In the case of each such actor, distinguishable in respect of the occasions as they occur in the course of the judicial drama, — will be the instruments which may come to be uttered by them as above.

Commenced, in every case, will be the judicial transaction, by some person acting in the character of an applicant, and not by the judge.

Exceptions excepted, on no occasion can the judge, as such, give commencement to any judicial proceeding. For exceptions, see Constitutional Code, Chapter XII. Judiciary collectively, § , Sedative function.

For purposes other than that of giving commencement to a suit, may judicial application be made to a judge.

So many species of applications, so many species of applicants.

Persons to whom written judicial instruments emanate from a judge, are either — 1. Functionaries; 2. Non-functionaries.

Functionaries are, as above, either — 1. Non-judicial; or, 2. Judicial.

Judicial functionaries are, with reference to a judge of the grade in question, either of the same grade, or of a different grade: if of a different grade, they are either of a superior or an inferior grade. Co-ordinates are those of the same grade; super-ordinates, those of a superior grade: subordinates those of an inferior grade. Subordinate to every judge are all non-functionaries.

On a special occasion, for a special purpose, a functionary who, in ordinary, or say in general, is, with reference to the judge in question, super-ordinate, may be subordinate.

Addressed to a subordinate functionary, or non-functionary, a written instrument, expressive of the discourse of a judge, is a mandate, a judicial mandate.

To the nature of the judicial mandate addressed to him, will be referable the nature of the response, if any, transmitted or addressed to the judge, in compliance with, or in consequence of it.

The persons to whom, in consequence of a judicial application made to the judge, judicial mandates are addressed, will be determined by the course taken by the application; and where the application is terminated in (and gives commencement to, and is thereby converted into) a suit, by the course taken by the suit.

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The course taken by a suit is composed of, or say marked out by, the several operations, successively or simultaneously performed by the several actors, at so many successive times, posterior to the commencement of a suit.

The applicant, for whatsoever purpose applying, will, as above, have made his appearance without mandate, or judicial instrument of any other kind, received from the judge.

His examination for the day finished, the judge will either dismiss the application altogether, or continue it.

CHAPTER VI.

ALL-COMPREHENSIVE ARRANGEMENTS.

§ 1. *General Division.*

ON no occasion can it fail to be matter of satisfaction to the mind, to feel that it has within its grasp the whole of the subject-matter which it has taken for consideration. But on every such occasion, a movement necessary to this purpose is the occupation of the universal vantage ground, by ascending to the summit of the porphyrian tree. To endeavour to communicate to the mind of the reader this pleasurable sensation, is the business of the present chapter.

Expressed at length, judicial procedure is the subject of the present work. This being premised and understood, procedure alone is the denomination which, for brevity's sake, will in future be employed.

On every occasion, procedure has alike for its object the giving execution and effect to this or that article of the substantive branch of the law.

On every occasion, the substantive branch of law has for its objects one or other of two results: giving effect to some right, or applying the appropriate remedy to some wrong. Correspondent to these two objects of the substantive branch of law, are the two species of processes, called suits, in adjective law. Correspondent to effectuation of rights, is a simply requisitive suit. Correspondent to application of remedies to wrongs, are inculpative suits.

Judicial procedure is an aggregate of connected actions, exercised by divers actors; the first of which has, or professes to have, for its object, or say end in view, the giving on some individual occasion, for some individual purpose, execution and effect to some determinate portion or portions of the substantive code, or say branch, of law.

Procedure may be divided into—1. Operations; 2. Instruments; 3. Stages.

Operations are—1. Application; 2. Probation; 3. Security finding; 4. Counter-probation; 5. Execution.

Applications are either contestational or non-contestational. The contestational are suits. Suits are simply requisitive or inculpative.

The *instruments* of procedure are — 1. Personal; 2. Real; 3. Written. Personal, the functionaries. Real, the judiciary apparatus. (See Constitutional Code.) Written, the contents of the Register.

Stages are — 1. Original inquiry; 2. Quasi Jury inquiry; 3. Appellate inquiry.

§ 2. *Operations.*

Operators and operations. On this occasion, as on every other, be the end what it may, to one or other of these two heads will be found reducible whatsoever, in the relation and character of a *means*, is contributing to the compassing, or say accomplishing or fulfilling of it. Operator, the real entity; operation, the fictitious, emanating as it were from the real entity.

The idea attached to the word operation is a modification of the idea designated by the word action, as that is of the idea attached to the word motion.

Instead of the word *operators*; a convenience will be found in the use made of the word *instruments*. And though the existence of the real entity, *an operator*, is precedent, where it is not concomitant to the quasi-existence of the fictitious entity designated by the word *operation*, — yet for developing the idea designated on this occasion by the word *operation*, and bringing to view the several sorts of actions, it was found to claim, by an indisputable title, the precedence.

In the instrument called *language*, or say *discourse*, at any rate in all the generally known modifications of it, note on this occasion an imperfection, the inconvenient effects of which will be continually exemplifying themselves: the want of two different appellations for the designation, — one of the act, or say the operation — the other, of the result, whatever it be, of that same act or operation. The consequence is, the necessity of employing, for the designation of two ideas so widely different, one and the same word. Unfortunate indeed is the existence of this imperfection.

It pervades and fills with perplexity the whole texture of the language. Every word that terminates in *tion*, and many of them that terminate in *ment* (both derived from the Latin, and common to the Italian, French, Spanish, and Portuguese, as well as the English,) is infected with it.

Application is the act of a party — the party-pursuer — requiring execution, execution and effect, to be given to some article of the body of the law.

Execution, when ordered, is the act of the judge, rendering the service required at his hands by the suitor.

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Probation is the act of the suitor, necessary to give warrant and authority for the service so demanded at the hands of the judge.

Execution requires to be distinguished and divided into ultimate and provisional.

Probation requires in like manner to be distinguished and divided into provisional and definitive: and that on the part as well of defendant as pursuer.

Of provisional execution, the need is accidental only, not general and constant. It consists in the doing that for a time, and in such sort, as to be eventually undone should the case be found not to require the performance of *definitive* execution: of which provisional execution, the performance is no otherwise consistently with justice performable, than as necessary to secure the eventual performance of definitive execution, should the case be found to require it.

By *accommodation*, understand that operation which is performed as often as a person, who is not a party to the suit, steps in and lends his assistance to a party on either side, for the purpose of saving him from an injustice, or hardship coupled with injustice, to which he might otherwise be subjected, in the course of the operations necessary to the prosecution of his pursuit or defence.

In so doing, the person by whom the accommodation is afforded, to one or other of the parties at least, and perhaps to both, subjects himself of necessity to one essential, and frequently to several distinct and contingent hardships: no other person is admissible for the purpose of liberating a party, on the one or the other side of the suit, from an otherwise inevitable present disadvantage.

Thus, in actual English technical practice, the two persons who, under the aggregate appellation of bail, are admitted to render to a party defendant the service which consists in causing him to be liberated from an imprisonment of indefinite duration, to which the rigour of the course of procedure would otherwise subject him, are not admitted to the performance of this beneficial service but upon condition of either eventually re-consigning him to that afflictive situation, or discharging in favour of the pursuer the obligation, to subject him to which, was the object of the suit.

Subject to these conditions, the initiatory allegation has, to the purpose of warranting provisional execution (so shaped as not to be productive of irreparable damage,) the effect of probation, provisional probation. But, for the purpose of rendering the provisional execution definitive, it requires to be subjected to the controul of any such counter-evidence as may be adduced by the defendant, together with evidence, probative of facts, if any such there be, the tendency of which is, to do away with and render of no effect any facts to which it has happened to be sufficiently established by the evidence advanced on the pursuer's side.

Intimate is the connexion between all these several operations: necessary are all of them but one, to wit, auxiliary bondsmanship, to the due termination of every suit, on the pursuer's side.

In two opposite orders, they are capable of being brought to view: — 1. The order in which they are contemplated; 2. The order in which they are performed.

In the order in which they are contemplated, they stand thus: — 1. Application; 2. Execution (execution being the only object to which the application is immediately directed;) 3. Probation, having for its object the engaging the judge to take measures for eventual execution.

Probation commences with application. Abhorrent to natural procedure is the distinction between allegation, or information, and evidence. In technical procedure alone — in that system alone which had for its object the generation of lies, for the purpose of maximizing the number of groundless suits and defences, — could any such distinction have originated. So many instances in which admission and effect is given to allegation, which, for the purpose of being punishable in case of mendacity, is not considered as evidence, so many instances in which admission and effect, and thereby allowance and encouragement, is given to mendacity. Innumerable are those instances: not a suit that does not commence with one of them; and of the endless chain of them, the first links are occupied in depriving of liberty any man at the pleasure of any other, by whom the faculty of exercising oppression in this shape is ready to be purchased of the judge at the established price.

§ 3. *Instruments.*

Correspondent to operations are instruments. For every operation there must be an operator. If by a single action the operation is performed, there is no room for an instrument. Associated with the word operator, is the idea of an intelligent being; with the word instrument, that of a non-intelligent being: if, then, the appellative instrument is applied in speaking of a person, it must be in an improper and figurative sense; but to save words, using the word in this figurative sense will, notwithstanding its impropriety, be frequently found a matter of convenience.

Of the above-mentioned operations, the system called procedure has been found composed: to one or other of these heads, every operation performed in the course of it will be found reducible; for every one of those operations, therefore, there will be found instruments.

Beings being either persons or things, hence

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we have personal instruments and real instruments. But portions of discourse in a written form, partake of the nature of those two subject-matters of consideration and operation: being the discourse of persons communicated by a sort of things, and the use of them being so extended and so continual, — hence the need of speaking of a third sort of instruments, to wit, *written;* within the import of which must be understood to be comprehended *quasi-written*, for the purpose of those which, though not exactly of the nature of written signs, are nevertheless employed sometimes in the production of the effect.

Personal instruments are sub-operators — instruments in the hands of a super-operator; *prehensors*, for example, in the hands of the judge.

1. Correspondent to application — the operation — the fictitious, is applicant the operator, the real entity.

2. Correspondent to probation — the operation — the fictitious, is probator, the really existing entity. *Probator* is accordingly the term presented by analogy. Unfortunately, the idea it presents is too ample — it is that of the success of the operation termed probation; whereas little less frequently is the one followed by non-success than by success. To keep clear of misrepresentation, to the office here brought to view, another term, by which nothing is decided as to success, must be found: instead of *probator*, say then *evidence-holder* — an appellation unfortunately two-worded, for a single-worded one could not be found.

Instruments of *application*. Personal instruments are the applicants. Applicants may be either principal, or *auxiliary*—lending their assistance to the principal: and will be either professional or gratuitous. Thus on the occasion of every judicial application, whatsoever may be the object. So, in particular, on the occasion of that sort of application, to which it happens to be converted into a suit.

Real instruments of application, none.

Written instruments of application are any such portions of discourse in a written form, as it has happened to the application to give existence to.

Instruments of *probation* are personal, real, or writtten. Personal instruments of probation are persons, considered either in the character of narrating witnesses, or as possessors of sources of real or of written evidence. In all three cases, there will be an advantage in speaking of them by the common appellation of evidence-holders; holden in the breast, until it is uttered, is the evidence of the narrating witness.

Narrating is the epithet applied to one species of witness, to distinguish him from a very different sort of witness (though the two characters are so frequently, as it is always desirable that they should be, in one person,) a percipient witness. In the breast of the percipient witness is the source of the information — the organ of the narrating witness is the channel through which it is communicated to the judge. Turbid are the ideas of lawyers under technical procedure; correspondently scanty, and in proportion inadequate, their vocabulary. Obvious at once, and necessary, is the distinction between the percipient and the narrating witness. Never till in this work, or those which have emanated from the same source, have words been employed in giving expression to it.

Yet how important is this distinction! — Small, indeed, it will be seen, is the probative force of the narrating witness, who has *not* been a percipient witness, in comparison of that of him who *has*.

Probative force — not even that term did the technical vocabulary contain in it. Yet, without it, in what way or by what discourse can you express that which there will be found such continually-recurring need to express.

Yet another distinction. For giving expression to it, say — litigant witness, or non-litigant witness: and as synonymous to non-litigant witness, say upon occasion, extraneous witness. In every modification of the technical system, of the testimony — the narrative of a party litigant, has more or less use been made; yet in none of them has he been spoken of in the character of a witness: on the contrary, between the character of a party and that of a witness, the existence of a sort of incompatibility has been tacitly assumed.

Yet in domestic procedure — in that procedure which, being coeval with the origin of the species, was in existence and use before the technical system existed, even in imagination — seldom is a narrator to be found, who is not either himself a litigant witness, or imbued with the same affection, and liable to be turned aside from the path of truth, by the same biases.

And oh what inconsistency — what twistings and turnings, when of one and the same party litigant the testimony is admitted in some cases, excluded in other cases — in some cases rigorously exacted, in other cases left optional! And from the commencement of the reign of technical procedure to the present time, how enormous must have been the mass of that injustice, of which this exclusion, and the unilateral, and thence partial, admissions deduced from this source, must have been productive! For these exclusions, coupled with these admissions, had there been any ground in reason, human society antecedently to the institution of the technical system, could not have continued its existence. But of this hereafter.

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Accommodators. Novel as it is, as a substitute to the long-winded and many-worded appellation — the person by whom accommodation is afforded to another — this, or some other universal appellation, must of necessity be employed. Necessity warrants the appellation—practice will, ere long, familiarize the import of it.

A work of beneficence is, on every occasion, the work of the accommodator; of benevolence generally, and thence presumably; of beneficence constantly and unquestionably. Beneficent accommodator, is therefore a denomination by which, without impropriety in any shape, the *accommodator* might be designated. But for as much as there cannot exist an accommodator who is not beneficent, the word beneficent is not necessary, and after this explanation may be spared.

Correspondent in some sort, though very imperfectly and inadequately, to execution, is *executioner*. In a sense co-extensive with that of execution — in the phrase *giving execution and effect*, it is spoilt for use, by the association it has contracted with the idea of an operator exclusively employed in giving execution to a mandate of penal law, productive of an effect in the highest degree afflictive. For by the word executioner, when presented by itself, will be presented the idea of a functionary employed in giving termination to life, in the person of a defendant in the suit.

Another conjugate of the word execution, and, like executioner, the name of the really existing entity, is *executor*. But for use, as applied to the present purpose, this denomination is also spoilt: executor being the denomination given to the species of trustee, to whom, by the will of a person deceased, the disposal of his property, reckoning from the time of his decease, has been intrusted.

In case of need, for the designation of the person employed in giving execution and effect to a portion of law, the term *executant* may perhaps be found employable.

Correspondent to communication is *communicator*. Unfortunately, this word labours under the same imperfection, as the word probator has been seen labouring under. Included in the idea presented by it, is that of the effect endeavoured at, as being actually produced. The appellation on this occasion needed, is one by which a person employed in making, or endeavouring to make, communication of the subject-matter in question, shall be designated.

In case of need, as the word executant, so the word *communicant*, both of them related by analogy to the word applicant, may perhaps be found employable.

Correspondent to recordation is recordator — for shortness, termed recorder: correspondent to the synonymous appellation registration, is registrar. In this case there is no difficulty, no difference between endeavour and performance. He who records not anything is not a recorder: he who records anything is a recorder, be the recorded matter ever so little, or ever so much: and so in regard to the registrar.

§ 4. *Judication.*

Before any application can be made, there must be in existence an authority, to which at any time it can be made. This authority is that of the judge, sitting in that which has been called the judicial theatre. Of the several classes of persons who are as it were actors on that theatre — of their several functions and duties, a description has been given in the Constitutional Code, Chapters from XII. to XXIX. inclusive. Reference to that portion of matter must be understood to be made in and by everything that here follows.

Coeval with application and probation, is judication: as to application, under the natural system of procedure, all application is probative. Without the judge's being at the same time applied to, and acting at the very time that he is applied to, an application cannot in any case have place. Without permission to proceed, no applicant can be suffered to proceed. Hence, then, it is by application made by an applicant that the first moment is occupied: but it is by the applicant and the judge in conjunction, that occupation is given to the next moment, and thereafter to the number of minutes whatever they are, during which, at the initiative hearing, the intercourse continues.

On each occasion, to what judicatory shall or may application be made? The answer is short, and will naturally be satisfactory: To that judicatory, from application to which, the aggregate convenience of the several parties may most effectually be promoted and provided for.

No difficulty can have place in those cases which will always be of by far the most frequent occurrence. These are, where the residence of both or all parties is within the territory of the same judicatory, and where the subject-matter of the suit is also within that same territory.

The only case in which any difficulty can present itself, is that in which, the actual residence of the party applying to be admitted pursuer being in the territory of that same judicatory, the actual residence of other parties, co-pursuers or defendants, is in the territory of a different judicatory — the *actual* residence of each one of them, being at the same time capable of being different from the *habitual* residence: hence, by ringing the changes upon these differences, the following different cases are producible.

For holding communication between a judge

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and a judgeable, the communication beginning with the judge, there are two modes — the oral and the epistolary. All other circumstances equal, the oral, it will be seen, is by far the best adapted to each of the several ends of justice: to the avoidance of non-decision and misdecision — to the avoidance of delay, vexation, and expense. But when the residence, habitual or actual, of the judgeable, is at a certain distance from the judicatory, then comes the question, — whether the advantage in respect of avoidance of non-decision and misdecision (to wit, through the inferior instructiveness of the evidence when elicited in the epistolary mode in comparison of the oral mode) preponderates or not.

On this consideration, exceptions (if any) excepted, no otherwise, it is understood, can application, if made, be entertained, than when made in the oral mode. And what is moreover understood is, that the judicial locations will be to such a degree numerous, and the plan of partition by which they are marked out, to such a degree equal, that from the attendance of a person at the judicatory, no considerable inconvenience will in general be produced.

CHAPTER VII.

PRACTICAL GENERAL RULES.

§ 1. *Rules as to minimization of evil.*

On each occasion, have constant regard for all the several ends of justice; that is to say, minimize the sum, or the balance of evil, composed of the evils opposite, respectively to these ends.

Of the several elements of value as applied to pleasures and pains, thence to good and evil, magnitude — the compound of intensity and duration — being the most apparent, be careful not to overlook those, which when the good or evil in question is distant, are most liable to be overlooked or undervalued — namely, propinquity and probability.

In like manner, in the case of any maleficent act or practice, whether on the part of persons at large, or on the part of judicial functionaries, forget not to take into account the evil of the second order, — to wit, the second order, composed of the danger, and the alarm, the publicly diffusive evil; any more than the evil of the first order — composed of the single-seated, and the domestically diffusive evil.

§ 2. *Rules as to irreparable evil.*

As to irreparable evil. It may be such either — 1. *absolutely*, or, 2. *relatively:* absolutely, to wit, in its own nature, relation had to the nature of man in general; relatively, to wit, relation had to the condition of the particular individual or individuals concerned. Death is so, in its own nature: pecuniary evil — pecuniary loss — is, in its own nature, in a greater degree more easily reparable, than evil in any other shape. Evil of a comparatively inconsiderable amount may be irreparable, relation had to the individual or individuals concerned.

Evil which, whether absolutely or relatively considered, is irreparable in itself, may also, relatively considered, not be irreparable in the way of equivalent.

Death is the only shape in which evil, on the part of the immediate sufferer, is certainly and invariably irreparable.

In the way, and by means of compensation, there is no evil to which it may not happen to be, in the instance of the individual in question, reparable in the way of equivalent.

Relation had to the individual in question, an evil is reparable, and exactly repaired, when, after having sustained the evil and received the compensation, it would be a matter of indifference whether to receive the like evil, coupled with the like compensation, or not.

What is manifest is — that to no person, other than the individual himself, can it be known whether, in his instance, between an evil sustained, and a benefit received on account of it, any compensation have place or not.

Considered with a view to its irreparability, the evil which an individual is liable to suffer is susceptible of the same division and distinction, as the sorts of offences to which an individual stands exposed: in the evil which is the result of the offence, may be seen the sole reason, or rational cause, for the endeavour, on the part of the legislator, to exclude or minimize it.

In this case, to minimize evil, have more especial care to exclude all such as is irreparable.

Irreparable evil may be produced — 1. For want of a judicial mandate; 2. By a judicial mandate.

The sides liable to be affected by it are — 1. The pursuer's; 2. The defendant's side of the suit.

Causes or sources, from which irreparable evil is mostly liable to flow, are —

1. Deperition, or ultimate non-forthcomingness, of the means of execution.

2. Deperition, or ultimate non-forthcomingness, of the means of proof, or say, sources of evidence.

Deperition, or ultimate non-forthcomingness, of means of proof, includes, if complete, deperition of the means of execution; to wit, in favour of that side, to the interest of which, in case of the proof, the execution would have been subservient.

Of a failure of the means of communication, deperition, or ultimate non-forthcom-

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ingness, as well of means of proof as of means of execution, may be the result.

By execution, understand as well reciprocal, as direct: direct, it is called, in the case where the object of it is to render to the pursuer the service demanded by him; reciprocal, where it has for object the rendering to a defendant compensation for, or security against, vexation and expense produced by the pursuit.

When there are two antagonizing lots of evil, considered as liable to be produced, the one on the pursuer's side of the suit — the other on the defendant's — two evils, both irreparable, or the evil on one side reparable, on the other side irreparable, forget not to take into account the magnitude and value of each. On this occasion, let not the imagination be deluded by the impressiveness of the idea attached to the word irreparable. Loss, though certainly irreparable to the amount of a shilling, will not be to be guarded against with so much anxiety, as a loss, though perhaps reparable, to the amount of a pound.

In a wrong-imputing, yet not penal, private suit, the irreparable evil to be guarded against is, deperition of the means of compensation, or other means of satisfaction, for the wrong execution in respect of the service demanded by the pursuer's, at the charge of the defendant's, side.

In a purely public penal suit, the irreparable evil requiring to be guarded against, for the sake of the pursuer's side, is the impunity of the defendant, in the case of his having been, in the shape in question, a delinquent.

In every sort of suit, the irreparable evils requiring to be guarded against, for the sake of the defendant's side, are — 1. On erroneous, or inadequate grounds, conviction, and consequent burthen of compensation, or punishment, or both, imposed upon the defendant: he in truth, not having been guilty, not having committed the wrong imputed to him, or any other similar to it. 2. The evil composed of the vexation and expense to which, by means of the suit, he may be subjected — the evil correspondent, and opposite to, the collateral ends of justice.

§ 3. *Rules for the guidance of the judge in the exercise of his ulterior powers.*

On each occasion, the direct and first care and endeavour of the judge, will be the fulfilment of the direct ends of justice; to wit, by taking such course, or doing that which in each individual instance shall be most conducive to the fulfilment of the direct ends of justice, positive and negative; further, to wit, the causing to be rendered when, and in so far as due, the service demanded by the pursuer.

His next care will be the fulfilment of the collateral ends of justice; to wit, by minimizing, on each occasion, the quantity of evil in its several shapes, delay, expense, and vexation at large, at the charge of the several classes of persons, in relation to whom his powers will have to be exercised.

When, and in so far as, the collateral ends of justice on the one part are seen to antagonize with the direct ends of justice on the other, it will be his care to pursue that course, by the taking of which, the balance on the side of good is greatest upon the whole.

On each individual occasion, as a security for the maximization of the aggregate of good, and the minimization of the aggregate of evil, he will settle in his own mind, and make public declaration of, the reasons by the consideration of which his conduct has been determined; which reasons will consist in the allegation of so many items in the account of evil, on both sides: magnitude, propinquity, certainty, or say probability, and extent, — being in relation to each head of good and evil, taken into the account.

Proportioned to the clearness with which those reasons are conceived, will be his own assurance and satisfaction of the conformity of his proceedings with the ends and dictates of justice: proportioned to the clearness with which they are expressed, will be the satisfaction afforded to the superordinate authorities to whom he is responsible.

For these purposes the constitutional code, on the principles of which this procedure code has been grounded, gives to his legal power a latitude, to which in general there are no fixed limits; and, at the same time, maximizing according to its utmost endeavours, the efficacy of the checks provided for preventing such his powers from being employed to any sinister purpose.

With a view to the collateral ends of justice, the following are among the cautions which he will have to observe: —

The applicant having been received, in the character of pursuer, or pursuer's proxy, and in support of the application, his evidence, appropriate or simply indicative, or both, elicited — the judge will not, in relation to any other person of whatever description (a proposed defendant, proposed witness, if any, or proposed co-pursuer, if any,) perform any operation liable to be productive of vexation or expense, unless in his view of the matter, taking such evidence for correct, a probability has place, that at the charge of the proposed defendant, the service demanded, or some other, more or less analogous to it, is due.

To the minimization of avoidable delay, he will have especial regard. Of delay, every moment beyond what is necessary to the direct ends is detrimental to the direct ends,

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as well as to the collateral ends, of justice. To the direct ends, by the intermediate eventual decease of the pursuer, by chance of deperition of sources of evidence on both sides; and in case of personal evidence, not already in writing, danger of diminution of clearness, correctness, and completeness, by faultiness of recollection. To the collateral ends,— to the prejudice of the pursuer's side, in so far as in the right, by and in proportion to the vexation attached to the non-possession of the service due — and incidentally by and in proportion to the expense, the need of which may have been produced by intervening accident; to the prejudice of the defendant's side, if in the wrong, in the greatest number of individual cases, it will not be; since the longer it continues, the longer he remains exempted from the service sought to be exacted at his charge.

But in so far as he is in the right, he stands exposed by it, equally with the pursuer, to sufferance, to the prejudice of the direct ends of justice, by deperition and deterioration of evidence, as above: and proportioned to his assurance of his being in the right, is the vexation he experiences from the apprehension of being ultimately regarded as being in the wrong, and on that account unduly subjected to the service, which though not due, is demanded at his charge.

But, of two or more applications made at the same time, no one is there which may not of necessity be made to suffer delay by the just demands made by others, in an indefinite number, upon the judge's time.

What may also happen is, that by deferring that which in the natural order of inquiry would be the next judicial operation to be performed, advantage may be produced, preponderating over the disadvantage, to any or all the ends of justice. As often as this is the case, the judge will accordingly defer, to some future time indicated, the performance of such next judicial service: but for reason, and justification, he will bring to view the particular incident or incidents by which exception has appeared to be made to the general rule.

In Buonaparte's civil code, the parties being in the judicatory of the justice of the peace, admitted into the presence of each other and the judge, — great is the anxiety expressed to prevent confusion on the occasion of such altercation as may naturally be expected: and on that account, for the prevention of that inconvenience, no person other than the judge is authorized to put a question to any other. In this anxiety, no cause for disapprobation can assuredly be found, especially when the character of the people he had to deal with is considered.

In English judicature, all cause for any such anxiety is effectually excluded: not existing in the presence of the judge, parties cannot quarrel or annoy each other in the presence of the judge. Saving the sparingly exercised right of the judge to put questions, to no party on either side is any question put by any sort of person but an advocate: nor, unless between advocate and advocate, or in an extraordinary case, in guarded terms, between advocate and judge, can altercation in any shape have place.

Among the cares of the judge, will in like manner be the minimization of the number of persons, of whatever description, operated upon by the exercise of his power; as also, in the instance of each such person, the number and vexatiousness of the operations imposed upon them respectively.

Accordingly, between the individual by whom, in each instance, the compliance necessary to the reddition of the service in question is to be produced, he will avoid interposing without necessity any intermediate hand. The reasons are —

1. By every such intermediate hand, so interposed, is produced a chance of delay, and a chance of ultimate failure.

2. By every such intermediate hand, so interposed, is produced vexation, if no compensation, or no more than inadequate compensation, be accorded: and in so far as compensation is accorded, expense.

Middle-agency-sparing, is the name given to this rule.

Of the application capable of being made of the middle-agency-sparing rule, examples are as follows: —

1. As per Constitutional Code, Chap. XII. Judiciary collectively. Giving to each immediate judge, once in possession of a suit, the faculty of operating for the purpose of it, in the territory of any and every other immediate judge; instead of an address from the judge of the originating judicatory, to the judge of the territory in which such several operations have to be performed; for though, for various purposes, notice of what is done may be requisite for the information of the judge in whose territory the operation is to be performed; so is it also, at the same time, for every needful purpose, sufficient.

By deferring the operation till after an answer from the judge in question had been received, or time for the reception of it elapsed, proportionable delay would be produced, and that without need or use.

When, for the purpose of justice, at the charge of any person, whether in the situation of defendant, or any other, the transfer of any subject-matter of property is to be made, let not the co-operation or consent of such person be made necessary to the validity of such transfer. If, at the hands of the person in question, disclosure of any matter of fact relative to such property be necessary, it will be exacted accordingly; but to no effect

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for which such disclosure may be requisite, can concurrence in any way, in the act of transfer, be needful or of use.

§ 4. *Inflexible regulations, none.*

For minimizing evil, the main caution is, in no case, on no occasion, to lay down inflexible rules (in particular, inflexible rules as to quantity) — rules of which on any occasion the effect may be to prevent the minimization of evil in the individual case calling for decision at the hands of the judge.

The pretence in this case is, the avoiding to place arbitrary power in the hands of the judge. But the good thus sought is illusory. In the hands of a judge, power, in whatsoever degree arbitrary, is no otherwise an evil, than in so far as its effect is to produce evil in a tangible shape — to wit, human suffering — in the breasts of individuals. But where an inflexible rule, as to the quantity of anything, is laid down, the chances against its not producing evil in excess, are as infinity to one.

Against abuse of power, the only effectual, or efficient security, is composed of responsibility: substantial, punitional, and dislocational responsibility, legal and moral.

For the prevention of the abuse of power, on the part of judges, the appropriate place is accordingly, not so much in the procedure code as in the constitutional code.

For exemplification of the evil certain of being produced by inflexible rules in regard to quantity, take the three capital objects — matter of *satisfaction*, matter of *punishment*, and length of *time*.

First, as to the quantity of the matter of compensation, or other means of satisfaction. If there be a case in which, of the compensation thus inflexibly fixed, the quantity be deficient—in such sort deficient, as to be inferior to the profit obtainable by the wrong—it operates, by the amount of the difference, as an inducement to commit the wrong, instead of operating as a means of repression for the prevention of it.

So likewise in the case of punishment. If in the case of any crime, the punishment is, all things taken together, clearly inferior to the profit obtainable in the individual instance in question, by means of the crime, the effect of the so-called punishment is to operate by the amount of the difference, *not* as a repressive bond, for the prevention, but as an incentive and encouragement towards the commission of the crime. To one offence (by which in the individual case in question, the delinquent has gained £100,) let £10 and no more have been the sum fixed on, the obligation of paying which, constitutes the sole punishment imposed. The effect of the law is, to operate as a bounty upon the commission of the prohibited act—of the act thus inexpertly prohibited—as a bounty to the amount of £90, subject to the deduction of the expense, and the equivalent for the vexation in other shapes, attached to the situation of defendant, in these cases.

In the article of satisfaction and punishment, provision against improvidence in this shape belongs obviously to the field of penal law, not directly to the field of judicial procedure. Of improvidence in this shape, the marks are in a particular degree conspicuous in Buonaparte's codes.

Now as to the fixation of length of time: length of time, allotted for the performance of various sorts of operations. In general, the pretence, or expected good, is avoidance of delay: but in general, besides the production of the opposite evil, precipitation, and thence the evil correspondent and opposite to the direct ends of justice, it has for its effect increase of delay, or increase of expense and vexation, or all three.

A year was the maximum to which Frederick the Great of Prussia fixed the greatest length of a suit at law in his dominions: not small was the service he was regarded by himself and by many another well-wisher to justice, as having by this exploit rendered to justice. What was the consequence? In the first place, wheresoever the quantity of business necessary to the avoidance of the evil opposite to the direct ends of justice (positive and negative) could not be performed within that time — production of the evil correspondent and opposite to the direct ends of justice. In the case of a to a certain degree complicated mercantile account, for example; in the case of the death or insolvency of a large capitalist, having extensive dealings with foreign states, this could not but be frequently exemplified; and in any case, by the expatriation of a single witness, if a necessary one, the same impossibility of rendering justice within the so allotted compass of time would be produced.

Of a rule thus improvidently all-comprehensive, delay, the very evil sought to be thus remedied, would naturally be not uncommonly among the fruits. This being the length allotted to the sittings, a judge to whose sinister interest delay showed itself favourable, would avail himself of the ordinance, to run on to the full length of it. This, he would say, is what the ordinance requires. Well, to this ordinance I have paid unquestionable obedience.

Under the English system, generally speaking, fixed lengths of time are allotted for every operation; lengths of time without any the smallest regard to the quantity of time necessary to the ends of justice — the different quantities demanded by different distances between place and place — the differences in respect of the degree of complication

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in the causes — the abodes of parties and necessary witnesses; in a word, not any the smallest regard is, in any part of the system of fixation, paid to the circumstances, nor therefore to the interest or feelings, of any of the individuals concerned.

In so far as the time is rendered unsusceptible of enlargement, here, in many instances to a certainty, is evil to a vast amount necessitated—evil, in that shape in which it is correspondent and opposite to the direct ends of justice. In so far as it *is* susceptible of being enlarged, here is a quantity more or less considerable, added to the fixed quantity of delay, vexation, and expense; for application must be made to the judicatory — application for the additional quantity of time. In support of the application, evidence must be produced — application with fees to solicitors, advocates, subordinate judicial officers, and perhaps judges — evidence carefully manufactured into the most unapt, delusive, and expensive shape.

Thus goes on the game of leap-frog, between strictness and liberality— each being in this, as on every other occasion, covered by a thick coating of well-paid and self-applied applause.

In English practice, whenever you see or hear the word strictness, expect to see injustice: you will seldom be disappointed.

Of the judicatories self-styled Equity courts, dilatoriness is, to the knowledge of everybody, the characteristic and most glaring cardinal vice. But could any unpaid eye endure to look into it, precipitation might be seen carried to a no less high degree of perfection: precipitation, by which in an extensive class of cases, the production of the evils correspondent and opposite to the direct ends of justice is habitually and with certainty secured.

Even at the commencement of every suit, in this kind of judicatory, the time allotted is, in most instances — considering the work that is to be done by it, and the lengths of necessary journeys — too short to admit of the work being done: for remedy, on payment of £1 : 7s. to Judges and Co., two several additions may be made, by the half of which, it is rendered in most cases too long. A temptation is in every case held out to purchase a third length of delay: but under this indulgence lies a trap, in which the comparatively inexperienced law-practitioners are frequently caught, and this in such sort as to produce, to the dismay of their respective and unsuspecting clients, the evil correspondent and opposite to the direct end of justice; — the client loses his cause, because, willingly or unwillingly, his lawyers have been deceived.

§ 5. *Substitution to inflexible rules.*

Of the several rules laid down in this code, there is not one that is meant to be regarded as inflexible: no one is there, from which, in case of necessity, the judge may not depart. But as often as he thus departs, the constituted authorities (the public-opinion tribunal included) will be looking to him for the reason — the specific reason or reasons, by the contemplation of which, such departure shall have been produced; and as often as he does this, without the assignment of any specific reason, he will be considered as having violated his official duty.

Every such reason, will consist in an indication of the evil which, in the individual case in question, would result from compliance with the rule: and with a proof, that by the aberration, either no evil in any shape has been produced, or none but what has been outweighed by concomitant good.

So in regard to exceptions. In many instances where a rule is laid down, in the terms of it, reservation is made of exceptions, and a string of exceptions is thereupon subjoined. To every such rule, the judge is at liberty to add an exception; but for every such exception, an appropriate and sufficient reason will be looked for at his hands.

§ 6. *Which side is most likely to be in the right?*

Antecedently to the view presented by the inquiry into the particular fact of the individual case, the general presumption arising out of the several relative situations will be in favour of the pursuer's, which is as much as to say, in disfavour of the defendant's side.

The general reason is, that without some ground of assurance and belief in respect of the correctness of his judgment, it is not likely that a person would engage in, or would subject himself to the vexation and expense attached to, the character of pursuer, even in case of success, — together with the still more ample eventual quantity in case of ill success. Thus on the score of mere self-regarding interest, particularly when the force of the additional restriction, applicable by sympathetic affection is added — a moral power which, how weak soever in comparison with self-regarding affection, should not in this, any more than any other case, be left altogether out of the account.

At the same time, the greater the success with which the endeavour to attain the ends of justice, direct and collateral, is crowned, the less will be the difference produced in that respect between the two correlative situations. The less the vexation and expense attached to the situation, the less effective will be the restraints, the tendency of which is, to prevent a person from embarking in it.

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In so far as the present proposed code is rightly directed to those exclusively legitimate ends, strong is the contrast it will be seen to form with the English system of procedure, not to speak of others less renowned for a supposed regard for the ends of justice.

CHAPTER VIII.

JUDICIAL APPLICATION.

§ 1. *Judicial Application — what.*

THE system of judicial procedure, it has been seen, has for its proper object, the giving execution and effect to the ordinances of the legislature.

The functionary, by the exercise of whose function execution and effect is given to the ordinances of the legislature, is the judge. The means by which that result is produced, is the rendering to a person, who having need of it, makes application to him accordingly for the sort of service, by the rendering of which the result is produced. Name of such appropriate services — judicial services.

The species of application by which such judicial service is called for, call it a *demand.*

The aggregate of the whole operation produced by a judicial demand, from the demand to the last operation by which execution and effect is given to the portion of law in question, both inclusive, — call it a suit in law, or for shortness, a *suit.*

In English practice — by a denomination manifestly inappropriate and productive of continual confusion — it is also called *a cause.*

But the case in which a *demand,* made at the hands of a judge, for services tending to the giving execution and effect to some corresponding portion of the text of the law, is the service called for, — is but one out of several cases in which, for judicial service tending to the production of that effect, application may be made, and that application complied with.

Accordingly, of divers sorts of application, by each of which judicial services of the tendency in question are applied for, and demanded — the application called a judicial demand, and by which, if ordered, commencement is given to a suit, is but one.

By a judicial application, understand an application made to a judge as such — by any person other than a judge as such.

By any person who is desirous of obtaining judicial service in any shape, a judicial application may accordingly be made.

By judicial service, understand every such service as a judge, as such, is warranted by law in rendering to any person or persons.

The services which it belongs to a judge as such to render, will be mostly those which are rendered in *contentious,* or say *contested* cases, — that is to say, cases in which a suit has been instituted, and continues depending. But neither are cases wanting, in which, without any suit instituted, it belongs to the judge to render certain appropriate services. So many of these cases — so many are the different *purposes,* for which a judicial application may be made. Certain cases, moreover, there are, in which, for the adjustment of the different interests concerned, judicial services may be necessary, even where no disagreement as between party and party has taken place. Of this sort is the case where the demand made to the judge is simply *requisitive,* and not, with relation to any party, either criminative or inculpative.

§ 2. *Applicant's Judicatory — what.*

It being desirable, in so far as practicable, that the territory in which the person in question will be most likely to be called upon to pay judiciary attendance, should be the territory in which he has his most ordinary habitation, in contradistinction, and in preference to, every more distant judicatory: hence it is desirable, that by persons in general, considered in respect of the need they may have to make judiciary application, it should be understood what, in the case of an applicant, is meant by *his* judicatory — as in the case of a judge, by *his* territory.

By the *applicant's judicatory,* understand the judicatory belonging to and situate in the sub-district in which, as housekeeper or inmate, as per Election Code, the applicant has his settled habitation, if any such he has. If, in each of divers sub-districts, he has a settled habitation, or divers settled habitations, so many as there are of these sub-districts, so many are his judicatories.

To an applicant who has a settled habitation elsewhere, but not in the sub-district to the judicatory of which he makes his application — as also, to an applicant who has no settled abode, — the judicatory, whatsoever it be, to which, on the occasion in question, he makes such his application, is, on and for that occasion, his judicatory; say his *occasional judicatory.*

Of the facility thus afforded to persons in the character of judicial applicants, no increase of vexation to persons having occasion to act in a judicatory in any other character, such as that of a defendant, or that of a witness in a suit, will, it will be seen, be the result.

In every case, therefore, any person whose desire it is to make application to a judicatory for any purpose, may in the first instance make application to his own judicatory.

If, the design of his application being to commence a suit against any person, the de-

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micile of that person is within the same local field of judicature, the case is in that respect the ordinary case. If such intended defendant has not any domicile within that same field, the case is in that respect an extraordinary case. It constitutes one of the natural causes of obstruction to the course of justice; provision for which is made elsewhere.

On hearing him, the judge will inform him what course to take.

§ 3. *Order of making application.*

For all persons waiting to be heard as applicants, the station is in the visitors' gallery; as to which, see Constitutional Code.

On entrance into the gallery, the intended applicant receives from the doorkeeper a ticket. The tickets are numbered in numerical order. He who, at or after the opening of the door, came first, received a ticket No. 1; he who came next, No. 2; and so on.

Immediately as the business of an applicant is finished, the judge or registrar makes a sign to the door-keeper of the gallery. The door-keeper, calling to the expectant applicant whose number entitles him to be next heard, looks at his ticket, and directs him forthwith to the applicant's station.*

If applicants more than one are desirous of speaking on the same occasion and in support of the same application, they must first have agreed among themselves as to the order in which they shall speak; if the whole number persist in speaking together, they will all of them be made to withdraw, until they have agreed upon the order of procedure as above.

If, with desires mutually opposite, a number of applicants offer themselves to speak on the same occasion, in relation to the same matter, each struggling to be heard before the rest, the order of procedure will be decided among them by lot.

§ 4. *Personal Attendance.*

Purposes for which the personal attendance of an applicant in the justice-chamber, while making his application, may be necessary or useful, with reference to his own desires, are —

1. Furnishing appropriate evidence as to facts, collative and ablative; say *Appropriate-self-serving-evidence-furnishing.*

2. Furnishing indicative evidence as to the above; say *Indicative-evidence-furnishing.*

3. Furnishing, at the instance of the judge, any such evidence as (though the tendency of it may be contrary to *his* desires) may be necessary to the preserving of other persons from vexation and expense, contrary to the ends of justice; say *Furnishing self-disserving* or *confessional evidence.*

4. Furnishing security against undue vexation imposable upon others, on the occasion of the application; say *Responsibility-affording.*

5. Furnishing means of co-enduring communication with him, for the purpose of the application; say *Accessibility-securing*, or *means-of-communication-affording.*

6. Receiving from the judge, warning against the damage liable to be sustained from sinister interest of *proxies*, professional or even gratuitous; say *Tutelary-advice-receiving.*

7. Receiving at the best hand, *i. e.* in an immediate way, the advice of the judge as to proceeding or not proceeding in the application; as to the mode best adapted to the ends of justice; say *Ulterior-course-concerting* or *settling.*

As to *Responsibility-affording:* — Evils against which, on the occasion of a judiciary application, appropriate security may be necessary, are —

1. Waste of judicatory's time; thence delay, or even denial of justice, to those who otherwise would at so much the earlier time, have been litigants.

2. Undue vexation and expense, to persons whose interest, according to the service demanded by the application, may come to be detrimented by ulterior proceedings. But, in so far as the applicant, though he be not the principal, can give as good security against these evils as the principal could, his attendance may be as useful as the principal's.

As to *Accessibility-securing*, or means-of-communication-affording: — The uses of securing adequately lasting means of certain communication with the applicant, are two, viz. —

1. Securing to him, if granted, the service demanded.

2. Securing the public and individuals against the evils just mentioned.

Hence the persons, communication with whom should be secured, are —1. The principal at any rate; 2. The applicant, if a person other than the principal. But in so far as this security can be as effectually afforded by the applicant, as by the principal, the principal's attendance is needless for this purpose.

As to *Tutelary-advice-receiving*: — As to this purpose, in so far as the need has place, the demand for the principal's attendance is strongest. True it is, that if the need exists, it may be made visible to him, by the record of what passed between his proxy and the

* In a code of procedure, the insertion of particular regulations of this sort are necessary to obviate hesitation, doubts, and diversity of practice. In a short time, practice will render them familiar.

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judge, and that for the purpose of such advice, the judge may, if he sees reason, command the principal's attendance. But, on the matter of the record, he may be more or less ill-qualified to form a judgment for this purpose. And there may be reason for his receiving the judge's advice, though by indolence, or some other motive, the judge may be prevented from commanding his attendance for that purpose.

As to *Ulterior-course-settling*:—If the case be such, that the principal has need of the judge's tutelary advice as above, the ulterior course, which it will be most fit for the procedure to receive, may depend upon the nature of such tutelary advice.

These considerations will serve as a memento to the judge, to be on the watch, for the need which may have place in relation to this tutelary advice.

As to *Confessorial-evidence-furnishing*:—For the prevention of evils to other interessees, true it is that the attendance of the principal may, after the attendance of the proxy, require to be exacted. But supposing it exacted time enough for such preventive purpose, the exaction of it, in the first instance, is to this purpose needless.

§ 5. *Applicants — who.*

On the occasion of a judicial application, applicants require to be distinguished, in the first place, into principals and proxies.

A principal applicant, is he by whom the application is made on his own account. A proxy applicant, is he whose application is made on an account of another, or others. In respect of a joint-interest, the same person may be applicant on his own account, and likewise on account of his co-interessees.

In relation to the benefit, or the burthen which is the object of the application, the applicant may be possessed, or not, of special interest, or any peculiar and self-regarding interest, in the subject-matter of the application. A person, the purpose of whose application is the procuring some benefit for, or the averting some burthen from, an individual or a community, with whom he is not connected by any special tie of self-regarding interest, is an applicant not possessed of any special interest in the subject-matter of his application.

A special interessee, may be so either on a purely self-account, or on a purely trust-account, or on a compound-account.

In so far as a person is interested on behalf of another, to whose interest he stands bound to give special support, he is styled a trustee on behalf of such other, or others; and the interest he thus possesses is styled a *fiduciary interest;* and the law by which he is so bound, is styled *a trust-creating law:* the person on whose account — for whose sake, the trust is created, is styled a principal in the trust, or say a *benefitendary.**

When a trust is created by law, as above, it may be either with or without the instrumentality of a person or persons operating to that purpose: when it is with such instrumentality, the person or persons so acting may be styled trustee, or trustees. In this case, there are three parties connected and jointly interested: — to wit, 1. The benefitendary; 2. The trustee; 3. The trustor or trustors; or say, the trust-maker or trust-makers.

In some cases, the trustor and trustee may be the same person: in these cases, the trustee is a *self-constituted trustee;* or say, an uncommissioned trustee.

When it is by the benefitendary that, under the sanction of the law, the trust is created, and a person or persons constituted and created trustee or trustees, it is by contract between such benefitendary on the one part, and the trustee or trustees on the other.

Examples of trusts and trustees, created by act of law, without the instrumentality of any person or persons, are as follow:—

1. A husband, acting and applying on account of his wife.

2. A father, in quality of natural, that is to say, law-located guardian to his son or daughter under age.

3. A mother, in default of her husband, in quality of natural, that is to say, law-located guardian to her son or daughter under age.

4. A guardian, in the case where, without need of his own instrumentality, he is law-located as such, in relation to a person under age.

5. A guardian, in the case where, without need of his own instrumentality, a person is constituted such, with relation to a person labouring under mental derangement.

Examples of trusts and trustees, created such by act of law, by and with the instrumentality of the trust-maker, but without

* In the English system, the benefitendary has no other name than *cestuy que trust.* This denomination, being taken from the obsolete law French, is altogether unintelligible to all but lawyers. Conspicuous is the awkwardness of its frame: it is a sort of an elliptical abridgment of a long phrase, the tenor of which remains to be divined: suppose *cestuy al bien de qui le trust est creé.* In the case of his being regarded as actually benefited, this benefitendary will naturally receive the appellation of a benefitee. But the actual fulfilment of the design entertained or professed to be entertained, is too precarious to admit of the substitution of the appellation *benefitee* to the word *benefitendary.* Witness the breaches of trust, the aggregate amount of which, in the case of charitable trusts, is under Matchless Constitution so enormous, as per the commission of inquiry, now so many years depending.

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the instrumentality of the beneficiendaries, are as follow: —

1. A testamentarily-located post-obituary administrator: the beneficiendaries in this case, with or without the administrator himself, are the co-interessees, as above, in the mass of property left vacant by the death.

2. The case where a person, desirous of conferring a benefit on a certain person or persons, invests a mass of property in the hands of a trustee or trustees, in trust, to be disposed of in a certain way mentioned, for the benefit of a person or persons in the character of a beneficiendary, or set of beneficiendaries.

Examples of trusts and trustees, created under the sanction of the law, by the trustor and trustors, and the beneficiendary and beneficiendaries, in the way of contract, are —

1. The case of a general agent and his principal; a general agent, to wit, or trustee, to whom the principal, as beneficiendary, entrusts the management of his pecuniary, and other interests in general. To this head belongs the case of a steward receiving the whole income of his principal.

2. The case of a special agent, acting in the capacity of a steward of a particular landed estate.

3. The case of the manager of a manufacturing concern.

4. The case of an agent or factor, acting in the sale of a particular article, or set of articles, whether in the way of ordinary sale, or in the way of auction.

5. The case of an agent or factor, acting as such, in behalf of a principal, habitually or temporarily resident in a foreign country.

In the Constitutional Code throughout, but more particularly in those chapters which concern the business of the administrator's department, may be seen mention made of divers functions, as exercisable by public functionaries, for the benefit of the public. In the instance of many, if not all of them, functions of the same nature, and thereby susceptible of the same denomination, are exercisable, and everywhere habitually exercised, by individuals in the character of trustees, on behalf of individuals, and bodies of men, in the character of beneficiendaries.

Examples of applicant co-interessees are —

Where a partner attends on account of himself, and his co-partner, in respect of the partnership estates.

A person attending on account of the mass of property belonging to an individual, or a partnership, in a state of insolvency.

A person attending on behalf of a body-corporate associated by law, and being or not being a member thereof.

A person attending as a representative, or member of a body of persons associated either promiscuously or on a special occasion, and for a special purpose, but not incorporated by any legal instrument.

A person attending, in a case of alleged and supposed necessity, in the character of a self-constituted trustee, for any of the classes of principals above mentioned, on the ground that, by negligence or sinister design, or by reason of a blameless want of appropriate information on the part of the proper trustee or trustees, the interest of the principal would, but for such application, be exposed to suffer irreparable damage.

§ 6. *Interessees — who.*

A person who on any account makes judicial application to a judicatory, becomes, by so doing, or assumes himself to be, an *interessee*.

Interessee is a word bearing reference to some subject-matter. By an interessee, understand a person possessing a legal interest (an interest sanctioned, or considered as being about to be sanctioned, by law,) in the way of profit or loss in some assignable subject-matter.

Such interest a man may possess either on his own account, or on that of another: if, and so far as it is, on his own account, it is a self-account interest; if, and so far as it is, on account of another person or persons, it is a trust-account.

A person who, with reference to the same subject-matter, is a self-account interessee and a trust-account interessee, may be styled a joint-account trustee.

An applicant, applying on behalf of a number of self-account co-interesses, is with relation to them a representative: he is on that occasion their representative; if he is one of their number, a joint-account representative; if he is not of their number, a trustee-representative.

Of an interessee's becoming such, the cause is, either his own agency alone, or the agency of some other person or persons alone, or his own agency in conjunction with that of some other person or persons. In the first case, he is a purely self-constituted interessee; in the second case, a located interessee; in the third case, a consenting located trustee.

A located trustee, is located either by the law, that is to say, by the legislature alone, with or without his consent, or by the law and some other person or persons jointly. In the first case, there is no trustor; in the second, there is a trustor, or set of trustors.

Of cases in which a trustee is located by the law alone, examples are as follow: —

A father, in respect of the power exercised by him in relation to, and over his children.

A husband, in respect of any such power as is given him, by law, to be exercised in relation to, and over his wife.

A guardian, in respect of the power over the person and property of his or her ward,

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in so far as established by law, without need of concurrence on the part of any person.

A trustee may be such, either without power or with power over persons or things.

A self-constituted trustee, as above, is a trustee without legal power. Without commission from any beneficiendary, or any located trustee, or the law, — undertaking the performance of a certain service, for the benefit of the beneficiendary, he constitutes himself, in so far, a servant of such beneficiendary: and for damage done to any person, on the occasion of such service, or supposed or pretended service, he is compensationally, and in case of sinister design, and evil consciousness or temerity, punitionally responsible.

Of joint-account representative applicants, examples are as follow: —

1. A person applying as member of a private partnership.

2. A person applying as member of a joint-stock company.

3. A person applying as one of two or more trustees, located as such, with power over a mass of property, placed at their disposal, for their own joint benefit.

Wheresoever a trustee is located as such, *a trust* is said to be established.

By a trust, understand a power, burthened with obligation—with the obligation of giving to the power such exercise, as in some particular way to render it serviceable to some person or persons, determinate or indeterminate, in any number, up to that of all the inhabitants of the political state.

Parties to every trust are — first, a person or persons by whom the service is intended to be rendered; second, a beneficiendary or beneficiendaries, to whom the service is intended to be rendered.

If it were by a single individual, that the trustee or trustees was or were located, he, in relation to them, is locator — sole locator; if divers individuals, each of them is a joint locator.

A trustor, by whom a trust is established by the location of a certain trustee or certain trustees, with power for continuing the trust, and preventing its extinction, by successive acts of location, may be styled the *founder* of that same trust.

§ 7. *Application how commenced.*

At the proper station, the applicant sits or stands in silence, until addressed by the judge.

Judge to applicant: — What is it you have to tell us of? —

1. A service which you claim, for yourself or any one, at the hands of any one?

2. A wrong for which you claim, for yourself or any one, satisfaction at the charge of any one?

3. A public offence, as to which you are ready to give us information?

4. Or anything, and what else?

After utterance of the introductive question, ending with the words *tell us of*, the judge makes a short pause, to give time to the applicant to say, *Prepared, sir*, or, I am prepared — if such be the case.

By the word *prepared*, the judge understands that the applicant is sufficiently prepared to state the nature of his application, under one or other of the above heads, without need of assistance from the judge.

If no such intimation is conveyed, then only it is that the judge proceeds to enumerate the several above-mentioned purposes, and modes of contentious application, that the applicant may settle with himself, and declare to which of them the matter he has to state belongs.

If, for want of appropriate aptitude, the applicant is unable to give, in the first instance, an intelligible answer to the above questions, in such manner as to refer the case to any one of the general heads already brought to view, the judge will continue hearing and interrogating him, till the import of his application is sufficiently ascertained.

For giving facility to these examinations, as well as for other purposes, a set of appropriate tables will have been provided, and kept hung up in the justice-chamber, in such manner as to be legible to the greatest possible number of persons at once; as also the like in smaller form, in such sort that one copy may be held in hand by the applicant, and another by the judge.

Examples of these tables are as follows: — *Table* 1. Table of *services exigible*, or *rights obtainable*, containing a list of the several sorts of effective services, which by the corresponding judicial services performed by the judge, one person may claim at the hands of another, without the imputation of wrong from the not having rendered them; adding to each service the several efficient causes of the right or title to receive it.

Table 2. Table of wrongs, *private* and *publico-private*, with the correspondent remedies; consisting in modes of satisfaction, with or without modes of punishment added or substituted to satisfaction, as the case may be.

Table 3. Table of *purely public wrongs*, with the correspondent remedies.

For these several tables, heads and matter may be seen in the *Introduction to the Principles of Morals and Legislation*, and in the *Traité de Législation Civile et Pénale*.*

If the applicant can read, the judge causes such of these tables as may serve for his assistance to be put into his hands, having in his own hand or view, copies of the same: if the applicant cannot read, the copy which

* See Vol. I. p. 96, *et seq.*

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the judge has, assists him in putting questions or giving instructions to the applicant, as the case may require.

If the application be contentious, the conversation will proceed as per Chapter XII. *Initiatory Hearing.*

If the application be uncontentious, the applicant will name it as above by its appropriate generic denomination.

To save time, these denominations will not, like the others, be recited by the judge. They are of comparatively rare occurrence; nor will they need, any of them, to be made by any person who is not able to explain himself sufficiently on the subject; to wit, either by perusal of the code, or by previous conference with some friend, from whom sufficient instruction and direction will have been obtained.

In any case, it may be either on the applicant's own account, or on account of some other person, that the application is made. But how the matter stands in this respect, the judge will without difficulty understand from the applicant's statement. Interrogations to that effect need not therefore be included in the judge's address as above.

For the several cases in which one person may make application on behalf of another, see Chapter XII. *Initiatory Hearing.*

At the commencement of the conversation, or at any time in the course of it, if it be clear that the applicant can read, the judge with his hand may point to, and if near enough, touch the spot on which the legend containing the warning against falsehood is displayed: as to which, see Chapter *Judiciary Collectively* (Ch. XII.) in the Constitutional Code.

In the case of an information, he will take the same course as above for ascertaining the nature of the wrong complained of, or the service to which the party in question has a right.

If it be the case of a wrong, as it commonly will be, and most commonly that of a crime, he will collect from the informant whether he be or be not desirous or content to be a pursuer, alone or in conjunction with some other individual, or the government advocate, or both; which done, he will determine as to the complying or not complying with the desire.

In this case more particularly, a question liable to come under consideration will be, whether the fact spoken to in the information be the criminal act itself, or only a fact capable of operating in the character of circumstantial evidence; and in both cases, whether according to his account the informant was in relation to the fact in question, himself a percipient witness, or whether all he has to speak to is his having reason to believe that another person, known or unknown to him, may probably have been, in relation to it, a percipient witness. In this latter case comes the demand for investigation, as explained in another chapter.

As already observed, there is no sort of case in which there may not be need of such investigatory process, nor any in which the service rendered to parties by the employment of it may not outweigh the vexation and expense. But in England, it not being employed but in cases regarded as belonging to the highest classes of crimes, or in judicatories into which the eye of the public scarcely penetrates, those higher classes of cases are the only ones in which the need of it can be expected to present itself to the generality of readers.

As to the person, if any, to whom the address shall be made by the judge before any is made to the defendant, — here again is a point in relation to which an option will be to be made by the judge.

So likewise in regard to the three several modes of address above mentioned.

On this occasion, too, will come the consideration whether to consign the function of pursuer to the government advocate; and no sooner does reason sufficient for this operation present itself, than the judge will perform it accordingly, that his opinion and decision respecting the points above mentioned may be heard.

§ 8. *Application — its purposes.*

In regard to purposes, the leading principle seems to be, that to all purposes that can with propriety be termed judicial, the faculty ought to be open to exercise; and to render the purpose judicial, it is not necessary that on the occasion in question a suit should actually have been instituted. It is sufficient, if either a probability having place that a suit of a certain description will be instituted, it will in probability be conducive to the ends of justice that the service aimed at by the application should be granted; or that if the service be granted, a suit conducive to the ends of justice may in probability be instituted, and the ends of justice thereby attained, in a case in which, but for this same service, a suit might otherwise not have been instituted, and thereby the ends of justice might have failed of being attained.

Cases there are, in which, though strictly speaking the business is not of a judicial nature, inasmuch as no contestation hath as yet place, and though at the hands of the judge no judicial termination of a suit may come to or be intended to be called for, — yet among the powers necessary to be exercised for the accomplishment of this desirable purpose, are some of those which are indisputably attached to the office of judges. Of this sort is the evidence-eliciting power and function.

On the present occasion will be added cer-

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tain powers, the demand for the exercise of which is created by some accident, or other event, by which it cannot without previous inquiry, that is to say, elicitation of evidence, be ascertained whether or not there may not be litiscontestation, and in consequence of it, demand for the exercise of powers exclusively attached to the office of judge. Had the state of facts been previously known, the powers necessary to the production of the desirable effect — for instance, the staying or reparation of calamity in this or that shape — might have been exercised by other efficient hands; but no such hands being in readiness, and those of the judge being in readiness, it is by them that the powers in question are exerciseable, with more effect than by any other, and by them that it is accordingly fit they should be exercised.

The purposes for which an individual may make application to a judge, as such, are either—1. Ordinary; 2. Extraordinary. The ordinary are,—1. Contentious; 2. Simply informative. The extraordinary are—1. Consultative; 2. Damage preventive; 3. Prospective-evidence-securing.

Purpose — contentious. By the contentious purpose, understand the purpose to institute a suit at law. When from the declaration made by the applicant, it appears that this is his purpose, and when by the judge his prosecution of this purpose is allowed, the suit is declared to be instituted, and the hearing thus going on is declared to be the initiatory hearing in relation to this same suit. The applicant in this case is a pursuer.

Purpose — simply informative. In contemplation of a certain criminal offence or wrong, from which he or some other individual, or the public at large, has suffered damage, or as he supposes was in danger of receiving damage — an applicant who is desirous that pursuit on the ground thereof be made by some one else (for example, by the constituted authorities,) but is not desirous to act for himself as pursuer, desires to be admitted to deliver information thereto relative, — such applicant is an informant.

If, in contemplation of an eventual suit purely non-penal, information through regard to the ends of justice or to the welfare of a party supposed to be interested, is given by an individual who has not himself any special interest in such suit, — this application is that of a non-commissioned proxy.

In English practice, on both these grounds, applications have place every day in certain criminal cases. The cases are mostly those in which the punishment attributed to the offence rises to the height of what is so unintelligibly called *felony*. But if in a judicial case of this sort, the receipt of information is capable of being of any use, so is it in every other. Yet in no other case is there a judge who will receive it. The sort of judge by whom, in this case, the information is received, is not the judge under whom the suit will receive its termination, but the sort of judge by whom a sort of preliminary, incomplete, and never-conclusive inquiry is carried on; to wit, the justice of the peace.

Purpose — consultative. By the consultative purpose, understand the purpose which is in view, when, being in doubt concerning the interpretation that may eventually be put by the judge on a certain portion of the body of the law, the application has for its object the calling into exercise the judge's pre-interpretative function. The applicant in this case is a consultant.

The motive for the consultation is — either for his own sake or that of some person in whose welfare he takes an interest, where a certain course in which the law has, as he supposes, a bearing — an anxiety to know in what manner it would by the judge be eventually regarded as bearing

Of the cases in which a demand for an application for this purpose may have place, examples are as follows: — 1. Conveyance: the applicant desirous of making, on certain conditions, conveyance of a certain right, of or relating to a certain mass of property, but not sufficiently assured of the validity or the impunibility of such conveyance. 2. Contract: so in regard to a contract to a certain effect. 3. Prohibited acts: so in regard to a certain act at large, which he is desirous of performing, but is not sufficiently assured of its not being regarded as prohibited, and thence punishable.

Purpose — damage-preventive. According to the source of the damage, this purpose may be — 1. Calamity — damage-preventive; 2. Delinquency—damage-preventive; 3. Absenteeship — damage-preventive.

For examples of the modification, of which calamity is susceptible, see Constitutional Code, Chapter XI. § 5, *Preventive Service Minister*. So likewise, for damages through delinquency. Under calamity include casualty; the difference being only as between greater and less; determinate separative line, there is none.

For the prevention of calamity—prevention of the commencement or the continuance, as the case may be, — application may also be made to a preventive-service functionary, as per Const. Code, or to the local headman.

If for the rendering of the service needed, powers such as belong to the judge, and not to those two other functionaries respectively, are necessary, then is it to the judge alone that application will be to be made; and if made to either of those other functionaries, the applicant will by them be referred to the judge.

By the absenteeship-damage, understand

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that which is liable to have place for want of proprietary care; the proprietor, known or unknown, distant from the spot, and no other person at hand, with sufficient authority and inclination to prevent the damage. Examples are —

1. Agricultural produce perishing for want of being gathered in.

2. Agricultural live-stock perishing for want of sustenance.

3. Perishable stock in trade perishing for want of appropriate care or sale.

For this purpose, application may also be made to the local headman.

Purpose — prospective-evidence securing. The purpose here is the saving a right, or a means of repressing a wrong from being lost for want of appropriate and judicially receivable evidence. Personal evidence is liable to be lost by death, physical inability, or local transfer of the person from whom it should have come; written and other real evidence by destruction, mislaying, or local transfer. If after commencement of a suit grounded on it, evidence should be made forthcoming, so should it before: reason in both cases the same. By securing it before the suit a suit may, in many cases, be prevented. In non-penal cases, the need is more apt than in penal cases, to have place: but as to the supply, if in any case conducive to the ends of justice, so it is in every other.

The person from whom the evidence is needed, may be the applicant, or any other person. In the first case, all that is demanded is, that the evidence which the applicant is ready to deliver, either be received and recorded: added or substituted, in the other case, is the demand that, as in an already existing suit, an appropriate order be delivered, ordering by whom, when, where, and how, it is to be delivered. The applicant in the first case is a prospective evidence offerer; in the other, a prospective evidence demandant.

In both cases, precautionary arrangements are needed for the prevention of abuse.

Under the English system, application for this purpose is not altogether without example. But by the example, such as it is, so far from being removed, the imputation of improvidence and inaptitude is but established and exposed. Co-extensive with the whole field of legislation and judicature is as above, the need; under the English system, no more than a corner of that same field is supplied.

As to the means of obtainment, so far from being obtainable without a suit, it is not obtainable without a suit of the most expensive kind, — a suit in equity, instituted for that sole purpose, unless already instituted for some other. Field of supply, a portion of the field of equity jurisdiction. What the whole is, belongs to the category of things unknown and unknowable: so likewise what this portion is; on each occasion, the whole and the part are whatever the judge pleases. Within that part, does your case entitle you to the service? Ere you can form the slightest guess, you have an ocean of distinctions to wade through — distinctions without reason and without end. Ask the chancellor, and when you have distributed a few hundreds, or a few thousands of pounds among him and his partners, creatures, and dependants, — at the end of a course of years, he will either tell you, or not tell you; and if he tells you, he will either grant you the supply or refuse it, making proclamation all the while of the profundity of his reflection, the acuteness of his discernment, and the anxiety of his fostering care. When thus granted in words, you will take proceedings for obtaining it in effect, and before they are concluded, be not surprised, if the evidence has perished.

§ 9. *Mode oral — why.*

No otherwise than orally delivered, and in the justice-chamber, is any judiciary application receivable.

But by any applicant attending as such, any letter, to whomsoever addressed, whether to himself or to the judge, or to any other person — may be read or presented for reading: the letter being open, and containing matter relevant to his application; and the applicant being responsible, in respect of the contents and the purposes for which it is exhibited.

A person by whom an application is made, and by whom accordingly an appropriate discourse is addressed to the judge, may, for occasional assistance and support, bring with him any person not specially inhibited. But for special reason assigned by the judge, any such assistant or supporter may be ordered and made to withdraw.

Concerning any matter, in relation to which judicial application may be made to a judge, no application can lawfully be made to him elsewhere than in open judicatory. To make any application elsewhere is, in the party making it — in attempt or preparation — an act of *corruptingness*, and as such, punishable; to receive it without disclosure, is in a like manner, on the part of the judge, an act of *corruptedness*. As to this, see Constitutional Code, Chapter XII. § 15. *Secret Intercourse obviated:* and also for the cases in which it may be requisite that the discourse should be secret, and for the mode in which such secresy shall be kept.

§ 10. *Oaths, none — why.*

Question: As a security for testimonial veracity, why is not the ceremony called *taking an oath*, here employed? — *Answer*:

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Because it is needless and inefficacious to every good purpose: to evil purposes, in prodigious extent, effective.

It is needless. The responsibility here proposed — responsibility satisfactional, punitional, and upon occasion, dislocational — responsibility to the legal sanction, responsibility to the popular or moral sanction, to the judicial and public-opinion tribunals — is abundantly sufficient.

It is inefficacious. Utterly devoid of efficacy it is proved to be, by universal and continually repeated experience. Under the English system, its invalidity, in respect of moral obligation, is abundantly recognised by the practice of the constituted authorities.

1. In the situation of jurymen in general. In no instance, when any difference of opinion has place, can any verdict be given without a breach of the promise thus pretended to be sanctioned. The verdict being delivered as unanimous, jurors in any number, from one to eleven, must have done that which they have all of them sworn not to do, — uttered a declared opinion contrary to the real one.

Instances are happening, and always have been happening, in which they unanimously concur in declaring as true that which all know to be untrue, and when out of the box scruple not to declare their believing to be untrue. Declaring a quantity of money stolen to be under a certain sum, when in fact what was stolen, if indeed it was stolen, could not have been less than several times that sum; declaring a defendant not guilty, when, according to ample, uncontradicted, and unquestioned evidence, he was guilty: in both cases, for the known and undissembled purpose of saving the defendant from the punishment appointed by law.

Under the eyes of the highest judges is always done what is thus done: judges never disapproving, oftentimes approving, commending, or even recommending. Not a judge is there of those now in office, to whom it is not perfectly known that all this is correctly true. When praise is bestowed by them, humanity is the word by which it is bestowed. Humanity displayed! by which laws are openly violated, and perjury openly committed!

2. In the case of coroners and coroners' juries, — as often as suicide is declared the result of insanity, when in fact it is the result of calculation — a calculation by which it is determined, that in what remains of life, if preserved, the quantity of pain will outweigh that of pleasure. The cases in which the operation is declared not to be the result of insanity are extremely rare. And then what are they? Those generally in which a man has left neither property nor friends, by whom his property, if any, at his decease could be shared. When the confidant of the Holy Alliance, so truly called holy (for what wickedness is equal to that called holiness?) put an end to his life, what he did was, as everybody knows, deliberate. If suicide is an act of insanity, so is voluntarily entering into a military service — so is choosing what appears the least of any two evils.

3. In the case of deodands imposed by coroners' inquests. When, by a loaded coach or waggon running over him, a man is killed, declaration must be made by them upon oath what the instrument was by which the casualty was produced. By the whole vehicle, or no part of it, says common sense. No, says jury and directing judge — not by the whole vehicle, but by one wheel and no more: by no other part was any contribution made towards the production of the effect. Here, then, is perjury — and to what use? To save the owner of the carriage from the loss of it. For when, by the unruliness of his cattle, the husbandman has lost a servant or a son, — to enrich him for his loss, all-wise judges have in their wisdom concurred in giving it with its contents to the king. Wisdom, with one hand, enforces the law; the same wisdom, with the other hand, defeats it.

Now, as to belief, how stands the matter with these men? Is it that they do not believe that any such person as God is in existence? Is it that, believing such a person to exist, they do not believe that the power they thus take upon them to exercise over him will have its intended effect — they the judges to decree at pleasure, he the sheriff to execute?

They who into the mouths of the elect are so constantly occupied in forcing perjury, are they not suborners of it? But the thing to be proved was, that, whatever be the restraint in any case put upon the motives by which perjury is prompted, — in the production of this restraint no part is ever taken by the ceremony of the oath. And the proof is — what? Where it has not for its accompaniment exposure to punishment in a visible shape, it is set at naught by everybody; but by none more universally than by those to whom, in profession, it is the object of such prostrate reverence.

The all-embracing jury-trial perjury could no otherwise be got rid of, than by giving to the majority, as in other cases, the power of the whole: a measure, the effects of which could not without considerable reflection be anticipated.

But the madness-imputing perjury, and the valuation perjury might be got rid of, at no higher price than the mortification of suffering the property to go or remain with the right owner: and among the whole race of heroes, whom, in the character of ennobled chancellors and judges, the country has for so many ages been adorned with, not one has ever been found hero enough to take upon himself

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this same mortifying task — by whom the benefit of clearing the country of this perjury has been thought worth the trouble.

When, by the whole elect of the country, the utter inefficacy of the ceremony has been recognised, it may seem little better than a superfluity to speak of the indirect recognition expressed by every House of Commons that ever sat. If it were thought of any importance that it should be employed in inquiries, in the result of which nothing more than the welfare of A and B is at stake, — could it ever have been left unemployed in inquiries, on the result of which so many millions are continually at stake? Could the Commons have quietly left the Lords in the exclusive possession of it? Could the Lords, temporal and spiritual, with common decency have kept to themselves the exclusive possession of it, if, for any such purpose, it had, in the opinion of either, been worth a straw?

So much for the uselessness and inefficaciousness of it. Now as to the mischievousness of it.

The prime article in the list of the evils produced by it, is the mendacity-licence, of which it has been, and continues to be, the instrument. To make men believe that it is by the imaginary eternal, and not by the real and temporal punishment, that the mendacity-restraining effect is produced (the House of Commons case excepted) on no occasion, for the repression of mendacity, is any real punishment employed, but when this ideal source of punishment is tacked on to it. Where no oath, on pretence of securing veracity, is employed, falsehood, though the evil consequences be exactly the same, receives the fullest and most effectual licence.

In the field of common law, with the fullest allowance from their partners in depredation, the judges — the hireling lawyers of all classes, on both sides, riot and disport themselves, while fattening upon lies. Beyond a certain extent, the quantity of these lies is optional; but up to that extent, it has, by those who profit by it, been made compulsory and unavoidable.

§ 11. *Before applicant's statement — responsibility how secured.*

Antecedently to the reception of the applicant's statement, the judge takes the requisite measures for securing the means of communicating with him after his departure from the judicatory, for whatsover purpose such communication may be requisite.

Needful, on two accounts, is this precautionary measure:—

1. On the account of the applicant himself, for the purpose of giving effect to his application, in the event of its proving well grounded.

2. On the account of the defendant, in the event of its proving ungrounded, with a view to compensation.

3. On the account of the public, in the event of its having been made wantonly, having for its object or effect the exclusion of other applicants from the benefit of justice, by wasteful employment of the judge's time.

First, then, let it be not a piece of information that the applicant comes to give, but a complaint, or a demand, that he comes to make.

In case of a complaint, he will set himself to inquire what the wrong is, which is the subject of it; and who the person is, or the persons are, who have been concerned, and in what ways, in the doing it: whether known to the applicant or unknown; if known, where the person's abode is, or what other more effectual means there may be of communicating with him for the purposes of the suit.

For the purpose of ascertaining what the wrong is, the judge will have before him the table of offences. It will be given in all its ramifications in the penal code, to which the proposed code here delineated has reference.

This table, with divers others, is constantly within reach of the judge, and within view of all the other actors in the judicial theatre. If the applicant can read, a look at it may enable him to save the time employed by the judge in the above-mentioned address. Frequently, while waiting in the suitors' gallery for his turn, a communication with his neighbours in the gallery, if carried on in whispers, at the intervals when the discourse carried on for the purpose of the suit are at a pause, may afford him such instruction as may more or less abridge the labours of the judge.

If the application be a complaint, the definition of the wrong will have informed the judge of the criminative circumstances, the concurrence of which is necessary to the existence of it. As need may occur, he will either mention these to the applicant, or wait to collect them from the applicant's statement, as it comes forth. And before he determines to call for the appearance of the defendant, he will, in like manner, satisfy himself that, according to the applicant's showing, no circumstances of justification or of exemption, relative to the species of offence in question, have had place.

If the application be, as above, a demand, the judge will of course have in his mind the respective natures of the several services capable of being demanded, without imputation of wrong, on the part of those at whose charge they are demanded: together with a list of all the several efficient causes of title, with respect to service in all those several shapes. This being confined to another such

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Table as above, will at the same time afford to the applicant such information as the state of his mind enables him to imbibe.

In the same Table in which are exhibited the several incidents which, with reference to the sort of service in question, have a collative effect, will also be exhibited, in conjunction with them, the several circumstances which, with reference to that same object, may have an ablative effect.

The same care which has been employed in the ascertaining, so far as depends upon the applicant's showing, the existence of some one article in the list of collative circumstances, will be employed in ascertaining the non-existence of all the several ablative circumstances.

In the course of the inquiry, he will ascertain whether there be any other persons, who, not being present in the character of co-applicants, are united in interest with the applicant.

So also in regard to witnesses.

So likewise as to defendants, and persons regarded as capable of being witnesses, or liable to be called as witnesses, on the defendant's side.

It will then be for the determination of the judge, to which description of persons application should first be made — whether to the applicant's partners in interest, to the applicant's expected witnesses, or to the defendant or defendants. And in such his determination, he will of course be governed by the joint consideration of delay, vexation, and expense; regard being had to the importance of the case on the one hand, and the probable quantity of unavoidable vexation and expense on the other hand.

His next consideration will be, in which of the three possible modes application shall be made to the several descriptions of persons above mentioned — whether in the way of accersition, prehension, or epistolary mandate and interrogation.

§ 12. *Self-notificative information, elicited how.*

When the purpose of the application has been established, or, if he sees reason, earlier, the judge proceeds to establish the means of eventual communication with the applicant, according to the nature of the purpose.

Judge to Applicant: — Produce your applicant's address paper, ready filled up, or make answer to such questions as I shall have to put to you, for the purpose of filling up this which I have in my hand.

If, by the applicant, a paper ready filled up is produced accordingly, the judge, either by the word *allowed*, with the addition of his signature, signifies his satisfaction with it as it stands, or proceeds, and continues to put appropriate questions, until it receives his allowance, as above.

If no such ready-filled up paper be produced, the judge, by appropriate questions, proceeds to elicit answers, until, under the several heads, such information as to him appears satisfactory has been obtained — the registrar, under the direction of the judge, setting down the answers in words or substance, but not any of the questions — such alone excepted, if any, as he shall have been required to set down, either by the applicant or by the judge.

At this stage, the judge may content himself with the information expressed in such answers as the applicant is content to give. By the purpose of the application, and the nature of the matter stated in pursuance of it, he will be determined whether to elicit information under the several other heads.

In respect of name, all that at this stage need be elicited is that which the applicant is at the time known by, and answers to: so in regard to condition in life, and abode. Under no one of these heads will he be required to declare the real, in contradistinction to the apparent state of the case, unless specially required; nor will he be thereto specially required without special cause.

If the applicant's purpose be either consultative or evidence-securing, seldom can it happen that on his part any desire of concealing either name, occupation, or habitation, should have place: nor yet, if his purpose be calamity-damage-preventive, or delinquency-damage-preventive, can it naturally have place. Not so if the purpose be either contentious or informative. For in the case of a person by whom, on this or that point, and in particular in the point of name or condition in life, the law has been transgressed, need of the protection of the law for himself, together with adequate motives for furnishing information of acts of transgression committed by others, may not be the less likely to have place.

§ 13. *Applicant's accessibility secured, how.*

In regard to habitation, if so it is that the applicant has not any such settled habitation as determined in and by the Constitutional Code, in the chapter containing the Election Code (viz. Ch. VI.) no entry, without instruction from the judge, will he perhaps be able to dictate.

In this case, either he has a habitation in the territory of some other judicatory, or he has not any in the territory of the state. If he has not any in the territory of the state, either he has not any at all anywhere, or he has a habitation in the territory of some foreign state. Whether in the territory of a foreign state he has or has not any such

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habitation, — in the territory of the judicatory in which he is making his application, either he has a temporary residence, or he is merely passing through it in the course of a journey, in the condition of a traveller. In which of all these several predicaments the applicant stands, the judge will, by appropriate inquiry, learn, and accordingly cause entry to be made.

For the purpose of maintaining appropriate intercourse with the applicant, it will not be necessary that his habitation (if in the territory of the judicatory, or elsewhere, he has any) should be known; it may be maintained by missives deposited at the habitation of any other person, or at any other place, at which, by his own hands, or those of any other persons, he declares himself sure of receiving it.

In general, only in the case where consequential proceedings are in contemplation to be carried on, will there be any need of establishing any means of intercourse. No such need will have place if the application be simply dismissed, unless, on the ground of delinquency, in some determinate shape, or for security to other persons against damage liable to be produced by the application, it should be deemed necessary to place him in a state of forthcomingness.

The case where the purpose of the application is contentious, and in consequence a suit will naturally have place, being that in which the importance of accessibility is at the maximum, as also the difficulty of securing it, — what belongs to this head will be found in its proper place.

§ 14. *Causes for dismissal.*

Causes or grounds for dismissal, may be any one of the following:—

1. To warrant the judge, in rendering the judicial service necessary to the performance of the service demanded, no adequate portion of law indicated by the pursuer, or existing, to the knowledge of the judge. Say for shortness — Law not proved.

2. No fact alleged by which, supposing the existence of it proved, the title or right of the demandant to receive the service demanded would be established. Say for shortness — Fact not proved.

3. The evil, if any, that has place or would have place, supposing the effectual service not rendered, not sufficiently great to outweigh the evil, which, in the shape of vexation and expense, would be produced, by rendering it.

4. The applicant not able of himself to furnish adequate satisfaction, in any shape or shapes, to the proposed defendant.

5. The evil, if any, not sufficiently great to warrant the exacting, at the hands of the demandant, the self-incarcerative security.

6. No person indicated by the demandant, as consenting eventually to subject himself to the burthen of satisfaction to an amount sufficient to outweigh the evil of vexation and expense, as above.

§ 15. *Proceedings, when secret.*

If, in the apprehension of the applicant, the case be of the number of those in which, for some specific purpose, secresy, in reference to the other actors on the judicial theatre should for the time be preserved, he hands over to the judge a folded ticket, in which the demand for secresy, together with the ground of it is expressed: whereupon the judge will, as he sees best, either continue the hearing in the public chamber, or transfer it immediately to the private chamber, taking with him the applicant and the officiating registrar.

Grounds for such secresy are as follows:—

1. On the part of the proposed defendant, danger of non-forthcomingness, if the application be known to him.

2. So on the part of a desired witness.

3. So, on the part of a proposed defendant, — abstraction of things moveable, to avoid eventual prehension, whether for means of probation, or for means of execution.

4. Necessity or probability of disclosures productive of damage to reputation in respect of sexual intercourse.

5. Necessity or probability of discourse offensive to modesty.

6. Necessity or probability of the revelation of facts, the disclosure of which might be prejudicial to the community in respect of its foreign relations.

So, if, in the course of the conversation, he sees reason, the judge will transfer the hearing from the public to the private chamber, having care to retransfer it to the public chamber, so soon as the need of secresy has no longer place; and so *toties quoties.*

If, by a party on either side, demand be made for a *recapitulatory inquiry*, secresy or publicity may again be demanded, by that same or any other party, on either side; thereupon the judge will do as he sees best, taking care lest, intentionally or unintentionally, secresy be broken in the course of the demand.

If, in the case of secresy, on the ground of damage to reputation, the injunction of the judge be broken, the offender will be responsible — satisfactorily and punitionally responsible — as for malice or temerity, as the case may be: and the truth of the imputation, will not be received either in justification or extenuation.

§ 16. *Deceptive fallaciousness — its modes.*

Falsity essential, falsity in circumstances, falsity in degree, falsity irrelevant. The distinctions expressed by these appellations will be noted by the judge.

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By falsity essential, understand the case in which, supposing the assertion false, the claim of the applicant falls to the ground. Examples:—

1. Where the subject of demand is money, on the ground of common debt.

2. Subject of demand—delivery of an individual thing, moveable or immoveable, simple or aggregate.

3. Subject of demand — money in satisfaction for a wrong, by the offence of simple corporeal vexation.

4. Subject of demand or of application — informative; publico-private wrong, by theft.

For modes of fallaciousness, other than falsity, see the Book of Fallacies.

Included in such fallaciousness, is irrelevancy—irrelevancy of evidence delivered in relation to the fact properly in question.

Falsity (when not irrelevant) is either completely contradictory to the truth, or incompletely contradictory to the truth.

Falsehood which is incompletely contradictory to the truth, is so either in degree or in circumstance.

By falsity in circumstance, understand the case in which, in respect of some circumstances, the statement appears to be false; but deducting the falsity, enough remains to warrant the judicial call upon the parties.

Example: Where, from the terms of the charge, it appears, whether from self contradiction on the part of the applicant, or from some generally notorious fact, either not known to him or not heeded by him, that the material act stated by him, if indeed it happened, did not happen at the *time* stated, or at the *place* stated, or that a person stated as present was not present.

By falsity in degree, understand the case in which, though, in the degree stated by the applicant, the result of the act stated by the applicant did not take place, or could not have taken place, it might, nevertheless, for aught appears, have had place in a degree sufficient to warrant the proposed call upon the pursuer. In this case, the falsity takes the name of exaggeration.

Example 1. In case of debt for goods sold, value as stated, so much; real value, not more than half as much.

2. Amount of the money constituting an equivalent, or satisfaction for damage sustained by goods, from ill-will or negligence, so much; real amount, not more than half as much.

From the amount of the exaggeration, with or without other circumstances, a judgment may be formed, whether it was the result of blameless error, of rash judgment and assertion, of insincerity or mendacity.

By falsity irrelevant, understand the case, where, though the assertion be tainted with falsity, the falsity is such, that, supposing the other parts of the statement true, the ground of the application will not be the less valid. In this case, it may be either blameless, temeracious, insincere, or mendacious. However completely soever irrelevant, it may still be not the less fit to be noted, as well for the purpose of the principal suit, as affecting the trustworthiness of the application, as opposed to any statements by a defendant, as for the purpose of constituting a ground for punishment.

The effect is of a particular kind, where the subject-matter of the deception, or the attempt, being a thing or a person, the erroneous opinion caused, or endeavoured to be caused, is identity with reference to a certain thing or person, wherein diversity is what really has place. As where a thing being the subject-matter, an appearance is put upon it by the deceiver, with the intent, that in relation to it an opinion should be formed, that the cause of its wearing that appearance was and is the agency, not of him the deceiver, or would-be deceiver, but either of some other person, or of unassisted nature. When the subject-matter is an assemblage of the visible signs of discourse, the attempt thus to deceive — the preparation made for deception — by a person (whose writing the discourse does contain,) with the intent that it shall pass as the work of some person other than him the deceiver whose work it really is, — is styled forgery — to wit, of written evidence: when the signs are of any other nature, the forbidden act may by analogy be still termed forgery, but in this case, forgery of real evidence.

In the Greek language, without difficulty, and in the English, if a word imported from the Greek language could be endured, it might be termed *prometamorphosis*, by analogy to metamorphosis.

False in degree. This may be converted into truth, by simple addition or subtraction.

False in circumstance. Circumstances are, with relation to the principal part of the matter of fact, either essential or unessential: essential *in* place and *time* — essential in *some place* and *some time* — because no matter of fact can have existed, without existing in some place, and in some time; — but it may be, that neither the individual place, nor the individual time alleged, may have been essential and necessary to the material effect of the principal fact in question.

Histories of trials, if well analyzed in this view, will be of great use in furnishing the mind with ideas of cases applicable on each individual occasion. But general rules, exercising an absolute dominion over decision, should not be made out of them.

Susannah's elders were deemed false witnesses, because, according to what one of

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them said, the act was committed under a tree of one sort, — according to the other, it was committed under a tree of another sort. But what if the trees were so placed, that it was committed under both of them? — or, if the animated act, being so much more interesting than the inanimate vegetable, one or both of them had, for want of the necessary appropriate attention, been mistaken as to the tree?

§ 17. *Justice-obstructing application obviated.*

On every occasion on which it appears to the judge that the application is groundless and frivolous, he will make declaration to that effect. If, in his opinion, the cause of it be want of due consideration for the value of the time of the judge and the judicatory to the public service, but without consciousness of its groundlessness, he will declare it culpable; and, for the purpose of determent in future, he will impose a small mulct. If, in his opinion, the cause of it be a desire to pre-occupy and employ in waste the time of the judicatory, for the express purpose of producing delay in reference to other suits in general, or a certain suit or set of suits in particular, (in which case, it cannot but be accompanied with evil consciousness,) he will make declaration to that effect, and declare the application groundless and criminal, and impose upon the applicant a much heavier mulct.

The produce of the mulct will in both cases be allotted to the helpless litigants' fund.

In ordinary practice, no person is admitted to apply for justice, without payment of money under the name of fee. The consequence is, a denial of justice to all those who are unable to pay the fee; and in the case of those who can and do pay it, but can ill afford it, adding hardship to injury — injury by the hand of government, to injury by the hand of the individual wrong-doer. By this means, the government offers encouragement to wrong; in the way here proposed, a pecuniary exaction will act as a discouragement to wrong.

If in consequence of divers instances of groundless application, one with another, it shall have appeared to the judge, that among the applicants or any of them, concert for the production of delay as above — vexation to the judge and judicatory — have place, he will declare as much, and give to the aggregate of such applications the appellation of a *conspiracy* — a conspiracy for the obstruction of justice; and in proportion to their respective pecuniary circumstances, give increase to the amount of the mulct respectively imposed upon them. Thus there will be so many distinguishable offences against justice — modifications of the offence denominated *obstruction of justice* — 1. Obstruction culpable, through rashness; 2. Obstruction criminal, accompanied with evil consciousness; and, 3. Obstruction criminal, accompanied with evil consciousness and conspiracy.

To the government advocate it will belong to be upon the watch for every such instance of obstruction to justice, and to make demand accordingly for the infliction of the mulct.

So likewise to the eleemosynary advocate, in default of, or at the request, or with the consent of, the government advocate, and with the consent of the judge.

Were it not for this means of repression, nothing would be easier than for a knot of men, — to whose particular and sinister interest the system of natural procedure, on this or that application expected to be made, were detrimental, — to stop the course of justice altogether, and throw everything into confusion: in consequence of which, the only system of procedure conducive to justice, would wear the appearance of being destructive of it.

At the expense of a reward, exceeding, though it were by no more than a small amount, the daily wages of the lowest paid labourer, thousands might be procured in such sort as to occupy for years with groundless applications, the whole quantity of judicial aptitude that could be brought into operation.

§ 18. *Application by a party to a quarrel; or say, Quarrels, how terminated.*

An occurrence naturally not unfrequent is this. Between an applicant and a party complained of, a series of supposed wrongs on both sides have had place. In a case of this sort, if, on the occasion of the application made on one side, the judicial service due be rendered to the applicant, no notice being at the same time taken of any wrong done by him to the proposed defendant, justice would be rendered in appearance, in reality not.

As to the multitude of the individual instances of wrong in its several shapes, capable of being done by one individual to another, there is no determinable limit; still less can there be to that of the instances of wrong on both sides. Of no one alleged wrong can the judge refuse to take cognizance, any more than of any other. Whatever in any particular instance may be the number, if on the day of the first application made by the party, cognizance be taken of the whole series, judgment may be pronounced on every one of them on that same day; whereas, if separate days be appointed for each, no limit can be assigned to the quantity of delay which may have place — delay to the suitor, with correspondent needless expenditure of the time of the several actors on the judicial theatre.

This considered, when, in consequence of application made — the applicant is received

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as pursuer, and the party complained of, as proposed defendant, such proposed defendant appearing — if so it be that, by such defendant, wrong in any determinate shape is by him alleged to have been done to him by the pursuer, — the judge, far from inhibiting such counter-complaint, will rather give encouragement to the exhibition of complaints on both sides; to the end that, in so far as practicable, termination may be put to all feeling of ill-will on both sides, to all resentment for wrong sustained, to all apprehension of wrong about to be sustained on either side — in a word, that perfect *reconciliation* be effected.

In this case, the damage, in whatever shape, from every wrong on each side, will operate as a set-off to every other; an account, as complete as may be, will be taken of what is due on each side; and a balance struck, and payment, in whatsoever may be the appropriate shape or shapes, made accordingly. In the case of an ordinary account of a commercial nature, this is matter of universal practice; in the case here supposed, it may with equal facility have place: a sum of money, due on the score of satisfaction for corporeal vexation, may with as much propriety and facility be set down in account, as money due on the score of ordinary debt; and for wrongs on either side or on both sides, satisfaction in a shape other than pecuniary may be remitted on one side, in consideration of satisfaction remitted on the other.

But though it should happen, that for mutual wrongs in any number, nothing in the name of satisfaction in any shape be found due on either side to either individual, — wrong to no inconsiderable amount may in this way have been done by one or both parties to the public — wrong, that is to say, by the consumption made of the judicial time as above.

Upon the whole, then, two distinguishable courses may, on any such occasion, require to be taken — two distinguishable functions require to be exercised by the judge; that is to say — 1*st*, the conciliative; 2*d*, the punitive.

To the conciliative he will, to the best of his endeavour, give exercise in every case; to the punitive, at the charge of either or both, if, and in so far as, the circumstances of the individual case appear to him to require.

The increased faculty of extinguishing ill-will, and at the same time rendering complete justice, as between any two or any greater number of persons regarding themselves as wronged, is among the advantages possessed by the system of natural procedure, in comparison of the system of technical procedure — by the proposed system, in comparison of the existing system.

Under the existing system, the impossibility of any such comprehensive and desirable arrangement is entire. Two causes, not to speak of others, concur in the production of it. A judicial meeting of the parties themselves there is none; and the expense of a single suit to the comparatively few who possess the possibility of defraying it, is so enormous as to destroy either the will or the power — or the will and power necessary to the engaging in so much as a single additional one.

By so simple an arrangement as that of the judicial meeting of the parties, in Denmark, under the judicatories called Reconciliation Courts, from two-thirds to three-fourths were struck out of the number of the suits carried before the judicatories acting under the technical system. This, too, under a host of disadvantages, of one of which the bare mention may seem to render unnecessary all mention of the rest: — no power had this judicatory to give execution and effect to its own decisions.

If, under such disadvantages, success was thus extensive, what may it not be expected to be, under a judiciary and procedure system possessing, in a degree so high above everything as yet exemplified, the power as well as the inducement to discover and ascertain what, on each occasion, ought to be done, and when ascertained, the power of causing it to be done?

To receive in no case a counter-demand as a set-off to a demand, would, on the part of the common-law courts, have been an injustice not to be endurable. What remained was to render the field of the application as limited as possible — as limited, and thence as indeterminate. For thereupon came the point, whether, in case of the demand in question, a counter-demand to the effect in question should be allowed. But unless it was on account of the delay with which the elicitation of the evidence in support of the counter demand would be attended, — if, in any one case a counter-demand is allowed, why not in every other?

§ 19. *Parties' forthcomingness.*

The judge will have the faculty of exacting at the charge of a person adequate sureties, against whom it is in contemplation to prefer a demand (and who, it is apprehended, is on the eve of departure from the country in question, to some spot not accessible, immediately or unimmediately,) to the powers of the judicatory, to the purpose of effectual justiciability in relation to such demand.

In English law, example of a suit having for its object the securing the forthcomingness of a person for the purpose of justiciability, — the writ, *ne exeat regno*.

Here the applicability of the remedy falls extremely short of the demand, in respect of its extent over the field of law and judicature; neither is it afforded to any person

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who is not at once able and willing to buy it of the judge and his partners in trade, at the expense of the most expensive sort of suit — a suit in equity.

§ 20. *English Practice.*

Against that system of depredation and oppression, of which law, substantive and adjective — more immediately substantive — is the instrument, and Judge and Co. the self-paid and richly-paid authors, the security that will be seen to be given by those two so intimately conjoined arrangements, viz. the appearance of the parties, and their responsibility in case of mendacity, will upon a detached view be seen to be such, as no person who had not applied himself to the subject with close attention for this particular purpose, could, in the nature of the case, imagine to himself.

Of this same most flagitious system, the arrangements correspondent and apposite to the tutelary one, form the two main points.

By keeping the door of the justice-chamber inexorably shut against parties on both sides, and particularly against those on the pursuer's side, the partnership forced under this one head, every person who, on either side of the suit, felt himself compelled to take this melancholy chance for that essentially adequate relief, which was to be sold under the name of justice.

For shortness, call this principle, the deaf-adder principle, or the judicial-deafness principle.

By confining to extraneous witnesses such security as they find it necessary to afford against judicial falsehood, the giving full swing to it to persons in the character of suitors. They thereby let into their net the whole tribe of insincere litigants on both sides of the case: all those who, for the purpose of depredation or oppression in any other shape, could, by the facility thus afforded, be content to purchase their official and most efficient instrumentality and support: to give effect to demands, known to be groundless, and by delay for an indefinite length of time, obtain a proportionable chance for ultimately defeating demands known to be well-grounded

Here, then, was an immense addition to the greatest number of customers they could have hoped for under any system which had for its object the ends of justice. For addition, say rather multiplication, — multiplication, and by a high power.

At one sweep, it gathered into the net, amongst others, the whole tribe of dishonest debtors; that is to say, of such debtors as by this encouragement they could succeed in rendering dishonest.

Call this principle the *mendacity-licence* principle, or for shortness, the mendacity-licence. Further on it will be seen improved into a perjury-licence, that encouragement to vice in this all-comprehensively-mischievous form might not be wanting to any class of human beings.

Calling it simply a licence, is not doing justice to it — is not yet painting it in its genuine colours; for when depredation is the object of licence, licence contains in itself the essence of reward.

This was not yet enough: it was almost enough for those who acted in the name of law; it was not enough for those who, as if to give a zest to profligacy, acted in, and prostituted the name of equity. It was almost enough for law; it was not enough for equity.

Not content with encouraging falsehood, they forced men into it. As to the matter of falsehood, common lawyers just contented themselves with vague quantities: false assertions on both sides — falsehood in the initiatory demand — falsehood in the initiatory defence — false declaration — and false plea: all this, however, is in a comparatively small number of words, with comparative moderateness of depredator's profit.

In the race of profligacy, not inconsiderable is the advance thus made by Common Law; but in this part of the case, as in so many others, she was left behind by Equity.

If a man owe you money, the Lord Chancellor Eldon will do, what the Lord Chief-justice Abbott will not do. He will let you ask the man whether he does not owe you the money, and whether, of the facts by which the debt was produced, the statement you make is not true. Think not, however, that an indulgence so extraordinary is to be obtained without cost. Before you can be admitted to set foot, and that only by proxy, in the temple of Equity, your honour at any rate, whatever part of it consists in abstinence from lying — deliberate and elaborate lying — must be left at the threshold. If the statement of a matter of fact, concerning which you are in ignorance, be necessary to the establishment of your right, being permissioned by equity to call for information at your debtor's side,—how would you go about it? Would you ask him at once how the matter stands? No such thing will you do, if, on this occasion, your lawyers know their business; for in this way you might ask long enough, before anybody would give you an answer. No: you must come out with a string of lies first, and no otherwise than on that condition will your debtor receive orders to furnish the information and acknowledgment which you have need of at his hands. The very thing which you do not know, and which to the Master of Equity it is known that you do not know, by his instrument, the Master in Chancery, he forces you to declare solemnly that you do know, stating the particulars of it in detail; your lawyer, the attorney

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called a solicitor, and the barrister draughtsman, consulting their imagination, and weaving a tissue of falsehood for the purpose. This falsehood has its equity name, and is called the *charge;* and the maxim is — every *interrogatory* must have for its support a correspondent *charge*.

Here, then, are so many more words to be paid for — paid for at so much a dozen, — paid for, over and over again, to so many different persons — judges, solicitor, draughtsman, Master in Chancery, Master in Chancery's creatures, — all of them having, in one way or other, a finger in the pie.

In a more refined, but not the less substantial shape, another mass of profit is yet behind. Of the profit thus reaped from falsehood, the continuance could not but be, in a more or less considerable degree, dependent on the degree of acquiescence on the part of those upon whom, and at whose expense, it is practised. But no sooner were it seen in its true colours, than those at whose expense it was practised, would of course, as far as the law millstone about their neck would admit of their doing, rise up and protest, with one voice, against the vice thus crammed into their mouths, while their pockets were being thus drained.

At the bottom of the system has accordingly always been, so to order matters as that right and wrong, morality and immorality, should be regarded as depending, not upon the effects produced by them respectively on human happiness, but on the oracles from time to time delivered, as occasion called — delivered by these arbiters of their destiny, by these masters of their fate: accordingly, in particular, that falsehood, when forbidden by them, or without being so much as forbidden, punished by them, was wrong; but that the same, or any other falsehood, as often as it was left by them unpunished, became a matter of indifference, and as often as commanded by them — not only right, but obligatory.

With how deplorable a degree of success this has been crowned, the whole community feels but too much unquestionably. In how complete a state of confusion has the most intelligent of nations, for so many centuries, remained! — insensible to the most marked boundary line that distinguishes vice from virtue: swallowing lies upon lies, and bowing down, with unabatable reverence, before the men who force them into their mouths! — absurdity and nonsense, both in the superlative degree, worshipped under the name of learning — vice, in its most sordid form, under the name of virtue!

All this while, of the object of this worship, what there has been in reality is — opulence in league with power. Nor yet has learning been altogether wanting to it. — Learning? but of what sort? Of that which consists in an acquaintance, more or less familiar, with an enormous and ever-swelling mass of absurdity and nonsense. Could but the head be emptied at once of the whole mass, it would be but so much nearer to the being furnished with real and useful knowledge — with that sort of matter, in the denomination of which the word learning can without profanation be applied.

By the opening of the door to all applicants, whose wish it is to obtain, on their own account, the benefit of judicial service, two opposite but correspondent and concurring effects are produced, according to the character of the applicant. On the one hand, to all sincere applicants, an advantage — an advantage, in respect of its extent altogether unprecedented, is secured: on the other hand, to persons at large, against the machinations of insincere litigants, a security alike unprecedented is afforded. On no occasion can any person expose another, in the situation of defendant, to the vexation and danger incident to this situation, without affording to his adversary that security against injustice, which is afforded by the applicant's thus placing himself in a situation of effectual responsibility, satisfactional and punitional, in the event of the application being regarded as not sufficiently grounded.

CHAPTER IX.

PROXIES.

§ 1. *Proxies, when and who.*

EXCEPTIONS excepted, no suit can be commenced but by application of the individual who demands to be received as pursuer.

The reasons are given in another place, where it is shown what the services are which are rendered to justice, by the attendance paid, and examination taken, of the proposed pursuer; and that without such his attendance, cannot be rendered with anything near to equal benefit.

Exceptions are the following:—

1. Temporary infirmity of body. Where the health of the party will not admit of his quitting his own residence, and the commencement of the suit cannot, without danger of non-execution on the part of the law, await his recovery.

2. Party's infirmity, by temporary or permanent mental derangement.

3. Party's infirmity, by caducity.

4. Party's infirmity, by nonage.

5. The party being temporarily absent, and the efficient cause of the demand has taken place since his departure: nor is his residence in the territory of any judicatory in which the suit could be commenced with equal advantage to justice.

In cases 1, 2, 3, or 4: Although, in any

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one of the above cases, the judge may receive a proxy, instead of a party, and, upon the evidence exhibited by the proxy, order the reception of the principal, in the capacity of the pursuer, the judge may, at the first hearing as above, or at any time thereafter, require, by appropriate mandate, the attendance of the party, either with or without the co-attendance of the proxy — to wit, by an attendance-requiring mandate, directed to the proxy and the party jointly.

In case 5, he will, if he sees reason, direct an appropriate suit-transmitting mandate, and have the option following: —

1. To dismiss the suit simply.

2. To retain it, advising, at the same time, the pursuer to carry his demand before another judicatory, that, to wit, within the territory of which the residence of the proposed defendant happens to be at the time.

3. Constitute the applicant the party's proxy, and, from the evidence adduced by him, in conjunction with the demand paper, commence the examination of co-pursuer's or defendant's evidence-holders, in the epistolary mode.

§ 2. *Litigational proxies.*

A litigational proxy is a person who, on the occasion of a suit, acts in the service of a party litigant, on either side of the suit; the party in whose service he acts not being present.

Such proxy is either a professional proxy, or a non-professional proxy: professional, serving for pay.

As a professional proxy, no person can be admitted to serve, who has not been duly located in the situation of professional lawyer, or, for shortness, say *lawyer:* as per Constitutional Code.

So likewise in cases inculpative or not, but not criminative.

So likewise in a suit criminative and purely public, to the purpose of subjecting the principal to a punishment no other than pecuniary.

So likewise in a suit criminative and publico-private, to the purpose of subjecting the principal to the burthen of compensation, with or without pecuniary punishment; but not to punishment other than pecuniary.

So likewise as to consent given by the proxy, on behalf of the principal, to any operation on the part of the judge, by him proposed.

So likewise in a simply requisitive case.

So likewise in a suit criminative and publico-private. But in this case, the government advocate, or public pursuer, will have care, lest by this means, of the suffering proper to be inflicted on the score of punishment, undue diminution have place: and may propose to the judge to make addition, in a pecuniary shape, to the punishment, in lieu of any pecuniary compensation, the remission of which may have been produced by such admission or consent on the part of the proxy.

A party defendant may apply for relief against an admission alleged by him to have been unwarrantably made, to his prejudice, by his proxy: to wit, for the purpose of being put (in so far as without preponderant inconvenience may be) in the same state as that in which he would have been, if no such admission had been made.

But then, except in case of valid excuse for non-attendance, he cannot do so otherwise than by repairing himself to the judicatory, and submitting himself to confrontation with the proxy, at the justice-chamber, for the purpose of their being interrogated by each other, and by the judge.

It will be among the cares of the judge, that from such disavowal on the part of the principal, damage in any shape shall not be made to fall upon a party on the opposite side of the suit; and that whatever expense may have been produced by it shall fall upon the principal, the proxy, or both, rather than upon any party on the other side; and in this view, he will be on his guard against collusion between them, for the purpose of addition intended to be made to delay, expense, or vexation, at the charge of the other side.

In a simply requisitive case and suit, the principal is provisionally bound by the admission of a professional proxy.

So by the admission of a non-professional proxy.

In either case, the judge, in case of apprehension on his part, lest by an admission made by the proxy, the interest of justice, as well as that of the principal, has been disserved, will state such apprehension, with liberty to the proxy to retract or modify such admissions, if he can consistently do so without prejudice to truth.

So, if he sees necessary, the judge, for reason assigned, may suspend any such operation as, on the supposition of the propriety of the admission, he would have performed, until information of the objection made to the admission has been transmitted to the principal, and response has been received from him in consequence, or time sufficient for the reception of such response has elapsed.

To hired lawyers, in the character of litigational proxies, shall admittance be given or denied? Given, of necessity, and beyond doubt. Preferable on several accounts, under certain conditions, are gratuitous proxies — But among would-be pursuers, many there will always be, to whom the finding any person, at the same time able and willing to give commencement and conclusion to a species of service capable of becoming so toilsome, would be utterly impossible. If, then,

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proxies in adequate numbers could not be found, who, for such remuneration as they found obtainable, were willing to furnish, for the purpose in question, the sort of service in question — the whole class of persons above mentioned would be exposed to wrong in all shapes at the hands of every evil doer by whom, according to his calculation, the profit extracted from the wrong would afford him a sufficient remuneration for his trouble. Thereupon comes another question: A man by whom the service in question has on this or that occasion been rendered, upon a gratuitous footing, to this or that individual, — shall it be allowed to him to receive payment for it in the case of this or that other? Here the proper answer presents itself on the negative side.

In the Constitutional Code, the case of the professional class of lawyers is brought to view, and provision made for securing on their part, by a course of observation and practice, what seemed requisite of appropriate aptitude. If, without distinction, others, by whom no such security had been afforded, are permitted to enter into competition with them, the adequate inducement for engaging in a course of labours of such duration would not be afforded, and the burthen of affording this security would not find any person disposed to take it upon his shoulders.

It may indeed be said, that merit could find its way in the case of this, as well as other arts; the degree of proficiency on the part of each man would be evidenced by his conduct. True: to some it would; but to others it would not. Those to whom it would be evidenced would, with little addition, be the better educated inhabitants of the town, of that town alone, in which the judicatory had its seat. The rest of the inhabitants would, on each occasion, be at a loss to whom to intrust their respective interests, and would be liable to be taken possession of, as it were, by the boldest and most artful intruder.

The function of law practitioner, or say litigant's proxy, is but one of two functions — nor that the most important one for which the services capable of being rendered by the class of men in question are needed. Besides the case in which it is only to individuals that the service is rendered, there are two official situations in which the need applies: 1. That of judiciary visitors for the three first of the five probative years; 2. That same situation, alternating with that of advocate of the helpless. True it is, that in the first of these characters they will not serve any otherwise than on occasions when waiting in company with their respective clients to be heard: equally true it is, that but for the preference expected to be obtained, after this long term of study and probation, scarce any one of them would be found to subject himself to it.

By what means shall security be given to the exclusive faculty thus proposed to be established? To an extent sufficient for every beneficial purpose, in this there will be no great difficulty. To exclude altogether from the advantage of receiving, in this or that individual shape, a benefit in return for the benefit conferred by this laborious and important service, will neither be possible nor desirable.

Whatsoever had been the value of the contribution received by the contraband trader in judicial service, let him be subjected to the obligation of refunding it, with a certain proportionable addition to it, in the way of penalty. Individually and collectively, the body of professionals would find inducement adequate to the purpose of securing, in the case of each individual, a pursuer able and willing to carry the suit on to its termination. As to evidence, that part which regarded the proof of the services rendered by the interloper would be matter of notoriety: remains the contraventional fact — the act of receiving retribution in some shape or other for the service performed. But under a rational system, in regard to evidence on this score, never would there be any difficulty: without the least reserve (under the universally-applying security against mendacity,) questions would be put to all persons cognizant. Under the check afforded by this security, small does the probability seem of infringements of this prohibitive arrangement, in any such degree of frequency as to frustrate the intended exclusive privilege.

Only in case of a regular and permanent contraband practice, carried on by interlopers in numbers, could the damage done to the licentiates taken in the aggregate be considerable; and under the influence of the here-proposed remedy, any such permanent contraband trade, carried on by any individual, for any considerable length of time, presents itself as impossible.

§ 3. *Of damage-preventive application, by uncommissioned proxies.*

An application may be made either with or without authority from the person or persons on whose behalf it is made.

If it be without authority, a *self-constituted proxy* is the appellation by which, in this case, the applicant is denominated.

A self-constituted *benevolent* proxy, is the appellation by which he will be designated, if, in the opinion of the judge, the desire of serving the interest of the party, on whose behalf the application is made, constituted the whole or the main part of the inducement by which the application was produced.

§ 4. *Unauthorized proxies receivable, how.*

A self-constituted benevolent representa-

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tive of an unrepresented absentee. By an unrepresented absentee, on this occasion, understand a person by whom an article or mass of his property has been left, or is supposed to have been left, unoccupied: no assignable person being known, or supposed, to have been left in charge of it.

In relation to this case, provision in considerable detail is made in Bonaparte's Civil Code. In the English system, no notice whatever is anywhere taken of it.

Whatsoever judicial service a person has a right to demand and obtain for himself, or on commission from another, for that other, he has a right to demand and obtain for another, without commission, from that other, on his finding adequate security for appropriate responsibility, for compensation in case of damage.

The parties to whom damage from such benevolent intervention is liable to accrue are — 1. The principal, on whose behalf the application is made; 2. Any person, in the character of defendant, at whose charge the powers, the exercise of which is demanded at the hands of the judge, will have to be exercised.

In the account of this eventual damage will be included any costs with which any proceeding had in consequence, may happen to be attended.

In so far as ascertained, the amount of every such cost may require to be advanced by the applicant, instead of its being imposed on any other person, to whom, in consequence of the application, communication may require to be made; especially if judiciary attendance or transmission of documents to the judicatory may be requisite.

Whatsoever may have been the inducement, it will be among the cares of the judge so to order matters, that to no person, other than the applicant, damages in any shape may ensue.

Accordingly, exceptions excepted, the judge will not subject any person, other than such self-constituted proxy, to any expense of which the application may be productive.

Exception is, when, from the result of the application, benefit in any shape ensues to the party in whose behalf the application is made; while, at the same time, either no benefit at all would have accrued to him, or no benefit so great as that which has accrued to him by this means. In this case, reward in consideration of, and in proportion to the net value of the benefit so reaped from his service, may, in case of a suit instituted for that purpose, be decreed to the applicant by the judge.

CHAPTER X.

JUDICIAL COMMUNICATION.

§ 1. *Subject-matters of communication.*

COMMUNICATION. — By this name is designated an operation which bears reference, and is a necessary concomitant to, all those others, and of which, on that account, no mention could have been made, till those others had been brought to view.

They, being so many distinguishable ends of procedure, it is, with reference to every one of them, a necessary means: communication, for the purpose of application and judication; communication for the purpose of probation.

Not to secure it, from the very outset of the suit to the very last act in it, on every occasion (and as between whatsoever persons and things, where the existence of it is necessary to the attainment of the ends of justice,) is a flagrant oversight. But should it be found, that for this omission, gold in torrents has at all times flowed into the coffers of those in whose hands the power was of preventing the deficiency, is it to any such cause as oversight that, consistently with the most ordinary degree of discernment, it can be ascribed?

In Bonaparte's code, no such flagrant omission has place. Not that the means provided are, in so perfect a degree as they might have been, adequate to the end; but towards the attainment of it, no inconsiderable advance has there been made.

Among the earliest and most anxious cares of the system to which expression is given in this code, and those connected with it, is to secure, from first to last, the existence and efficacy of an instrument so indispensable in the work of justice.

Upon the degree of civilization, and improvement in various other respects, but more particularly in the state of the physical channels of communication (the roads by land and water,) must communication for judicial purposes, in respect of promptitude, celerity, and cheapness, of course be in a great measure dependent.

Persons and *Things*. — On this occasion, as on most others that present themselves on the field of government, — in these two appellations may be seen the results of a division, of which the nature of the case renders it necessary to make use.

Of this division, both members require a further division, into *common* and *peculiar*.

As for other purposes, in all imaginable variety — domestic, and other social and sympathetic intercourse — trade, wholesale and retail, and the business of the several departments and sub-departments in the offi-

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cial establishment, so for this in particular,— the common, one great aggregate instrument of communication is the letter-post establishment, and the aggregate of the several stocks provided for the conveyance of large and heavy burthens, — including the roads, solid and fluid, over and through which the several masses of matter are conveyed, and the beasts, or other instruments of conveyance, by which the requisite motion and direction are produced.

By peculiar, understand those instruments of communication, the use of which is appropriated exclusively to the service of the department here in question.

§ 2. *Modes of communication.*

Communication is *from persons* only; from persons, it may be, either with persons or with things, or with both. From persons to persons, it may be either unilateral or reciprocal. Reciprocal it is, when in consequence of a communication made to a person, another communication is made from that person, to him from whom the first communication came. From a person to a person, communication is made in two different modes: the oral (the only original mode,) and the written. When it is the oral that is employed, the intercommunicants are necessarily, in that respect at least, present to each other: when it is the written, it happens sometimes that they are present, and that, notwithstanding such presence, there may be some special reason for their communicating with each other in that mode; but, in the ordinary state of things, they are at a distance. In this case, if it is in the written mode that the communication is effected, it is termed the epistolary mode: if the mode be not epistolary, the intervention of a third person is necessary; and, in this case, two communications instead of one have place — namely, one from the primary communicator to the third person, who in this case becomes an instrument of communication between them — another from the instrument of communication to the person to whom the communication is made.

Of all modes of communication, the simplest is that which is made in the oral mode, without the intervention of any such third person as above: in that most simple form, communication is cotemporaneous and coincident at the same time with the abovementioned mutually and necessarily cotemporaneous and coincident operations; that is to say, application, judication, and probation. In this case, the occasions for communication lie, as hath been seen, within a narrow compass.

Not so when the applicant, or the person who at his instance has been constituted the proposed defendant, or any non-party, or say, non-litigant evidence-holder, is called in. Now then comes the necessity for some instrument of communication, an instrument which, unless in some rare case, will be of the personal kind — in a word, some person to whom, in the character of a messenger, it belongs to convey the subject-matter of communication, most commonly of that real class, of which written discourse is composed, from the judge to the person to whom the communication is made.

This person being, by the supposition, at a distance from the official place of residence of the judge, now comes the demand for diversification and corresponding complication.

In a country in any tolerable degree civilized, there will be two modes of communication between persons at a distance: the one, which may be styled generally ordinary, to wit, the letter-post, or other public and universally employable receptacle, employed as an instrument of conveyance; the other special, or say particular, to wit, some messenger specially employed for the purpose, making or not making use of some real instrument or instruments of conveyance.

This distinction, though in itself purely theoretical, is pregnant with practical applications, not less obvious than important. Expensive to a degree more or less known by everybody, is even the least expensive submode of the special mode of communication: comparatively unexpensive and economical is the general, or say ordinary modes of conveyance, especially as applied to instruments of communication in the epistolary form.

By appropriate arrangements, the general mode of conveyance, but more particularly the letter-post, might be made to perform (and with not less certainty, and with superior dispatch,) the service by which, in present practice, some special mode of conveyance is commonly, if not universally employed. — But these details belong to a more particular head.

Communication, as we have seen, may be from person to person, or to things, or to persons and things, at the same time.

When it is from person to person, and back again from the second to the first, the two persons may be styled intercommunicants.

§ 3. *Means of communication.*

The first point to be determined is at what place the thing in question shall be done: whether in the judicatory, or elsewhere; and in particular at the abode of the addressee, whether party-litigant or extraneous *evidence holder*. In general, these two cases constitute the only alternative. The reason is, that in general, upon the circumstances it will depend, whether the communication shall

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be *oral* or epistolary: oral, if in the justice-chamber; epistolary, if at the abode, permanent or temporary, of the addressee.

But in a particular case, on a particular occasion, need may be, that though made in the presence of the judge, the response will not be to be made in the justice-chamber.

The first source of division is the consideration of the *place* at which the operation is required to be performed: the next is the *purpose* for which in that same place it is to be performed.

In the third case, an extraordinary place concurs with an extraordinary purpose: place, not the justice-chamber, but some other, in which, for the special purpose of that individual suit, and the individual operation, it requires to be performed.

The material circumstance is the *species* of the instrument of discourse,—whether oral, or otherwise evanescent — or scriptitive, or in any other shape *permanent:* this not by reason of the permanence of the instrument — for, for giving expression to the discourse, an instrument of the same degree of permanence might be employed in the judicatory — but by reason of the distance: hence it is by distance, and nothing else, that the necessity of giving employment to this instrument of discourse, to the exclusion of the other, is created.

On the part of a justiciable, whether party pursuer, party defendant, or evidence-holder, in answer to the mandate issued by the judge, the mode of compliance would be either by attendance or responsion: if by attendance, either at the in-door fixed judicatory, or at the out-door occasional and migratory judicatory.

As to the character, or say capacity, in which the modes of compliance are thus exemplified, it might be either that of party pursuer, party defendant, or evidence-holder, or some individual at large, incidentally and casually addressed, for the purpose of contributing, by means of some incidental services which it fell in his way to be able to render, to the giving execution and effect to the law on which the suit was grounded.

Here, then, comes the need for so many corresponding mandates:—

1. Accersitive, or say hither-calling mandate. This when the place at which the service is performed is the judicatory: the service itself is the ordinary in-door service.

2. Missive, or say thither-sending mandate. This when the place at which the service is performed is an incidental and migratory judicatory: the service itself is out-door service.

Only by personal attendance at or in the judicatory, can commencement as above be given to a suit: in which case, the need of missive mandate, on the part of the judge, may be apt to appear superseded. But the individual who, at the first application, is constituted a pursuer, might be either the applicant himself, or any one of two other descriptions of persons: to wit, where the applicant is an assistant, professional or gratuitous, such proxy, or say deputy, being for one or other of the best of reasons admitted instead of the principal; or a ward-constituted pursuer, in consequence of the application made by his guardian; or in a word, who is himself a pursuer, so it be at any period of the suit, after the first; the ward being constituted pursuer in his own right, and for his own benefit — the guardian in the right and for the benefit of the ward, or other trust.

On the part of the addressee, in whatever capacity addressed, — party pursuer, party defendant, or supposed evidence holder, or individual at large, — rendering response in some shape, will be an operation indispensable in every case. By the response, if pertinent to the matter in hand, either compliance with the obligation imposed by the mandate will be completely manifested, or (though for some reason assigned, not at the time performed) promised for some other time, or declaredly declined; if declined, then the object of the response will be, to exonerate the individual from the burthen of eventual suffering, either by satisfaction afforded, or by punishment suffered, or both.

§ 4. *Accessibility-securing.*

With regard to the means of intercourse, thus much is good and true in general,—that on each individual occasion they must be settled with, and adjusted to, the circumstances of the individual with whom the intercourse is to be secured.

As to those individual means, the general nature and character of them will be liable to vary according to the condition in respect of civilization of the country in question: they will depend partly upon the situation of the individuals to be communicated with, partly upon the nature of the means of communication which the state of the country affords.

As to the condition of the individual, in proportion as opulence is abundant, the means of communication are at once capable of being rendered more prompt and more secure: the greater the number of inmates in a house, and the more constant the habit of residence on the part of each, the greater the certainty of conveying to the knowledge of the head, or any other member of the family, the information requisite. In a certain state of society—that, for instance, which to so large an extent has place in America—many are they who have no fixed place of habitation; many again, they who, having each a fixed habitation, leave it habitually unoccupied for any length of time: even in Switzerland, this

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latter case is to no inconsiderable extent exemplified.

As to the British Isles, in no part of them is this case exemplified to any considerable extent. Under the name of *vagrancy*, voluntary or involuntary, such is the benevolence and wisdom of English parliaments, it is ever punished as a crime.

In Ireland, the meanest hovel — and such hovels are but too numerous — is either entirely open, or has a door to it: in the general state of things, a door has place; but this being by appropriate force moveable, and as such distrainable, and being, in but too many instances the only thing worth distraining, is sometimes, say all the accounts, distrained for rent. Where the door does not exist, any missive sent by authority may find its way in: with so much the less difficulty where there is a door, the having in it a slit adequate to the purpose of epistolary communication might, without sensible hardship, be rendered a condition indispensable to the use of this instrument of security.

Antecedently to the letter-post, scarcely by the most opulent condition in life, could any absolutely secure means of epistolary intercourse be established. By letter-post, no condition in life so abject, but that, for any purpose such as that in question, it might, in the case of every individual, be established in every instance.

In every the smallest division of territory, the existence of a local headman being supposed, here would be a spot by repairing to which, an individual who had no settled habitation might be sure at any time of finding anything sent thither to his address. For nowhere in the territory of a state could an individual find himself, without finding himself in the territory of a local headman. In the official residence of this functionary, the individual who had no fixed habitation might at all times be sure of finding whatever it had been made his duty to see: and if unable himself to read, there he would moreover be sure of finding those, in whose instance no such inability could have place.

For him who had no fixed habitation of his own, judicial missives — he being prepared and pre-engaged to receive them — might be addressed to him at the local headman's office: and for diminution of vexation to him who has a fixed habitation, another exemplar might be delivered at that same habitation; and so in the case of his having habitations more than one: and in this way may the most convenient provision be made for every occupation and situation in life.

Remains for consideration, the system of intercourse which the country affords: the territory of the state in general, and that portion of it in particular, from, to, and through which, on the individual occasion in question, the communication requires to be made.

In England, compared with all other countries on the globe, for this purpose as for every other, the adequacy of the means of communication is at its maximum, and by the spread of railroads, with self-moving receptacles moving on them, the maximum is in the act of undergoing prodigious increase.

For general purposes at large, and for commercial purposes in particular, in a country in which the population is at such a degree of density, the government post-office performs this function in a manner, the advantages of which are so strongly and universally felt. Justice, alas! presents a very different state of things. On this occasion comes the observation, that, unfortunately for England, the purposes of justice have never been the purposes of judicature, or the purposes of government: had they been, long ago the missionaries of the post-office would have been the missionaries of judicature; modes of delivery and receipt, together with appropriate documentary evidence of the facts, having for this purpose been established. But by the hierarchy of the post-office, probably by the hierarchy of the judicial establishment, obstacles, and those as insuperable as they could contrive to render them, would of course be opposed: to the most effectual and least vexatious arrangement that for this purpose could be proposed, the answer would of course be attached, — useless, mischievous, and impracticable: an official answer rendered familiar to him who writes this, by the habit of seeing it returned to proposed arrangements, which afterwards, when carried into effect, were found beneficial and unexceptionable.

§ 5. *Difficulties obviated.*

For what purpose soever, and in what character soever, on the occasion of a suit or other application, an individual makes his appearance for the first time, the judge will not suffer him to depart, unless he has given indication of some habitation or habitations, at which, during the continuance of the suit, any mandate issuing from or sanctioned by the judge (whether of that territory or any other) will be sure to reach him, if transmitted by the letter-post, or any special messenger.

Of two habitations, indication may be given in the first instance: as thus, till July the first inclusive, a mandate will reach me, parish A of this territory, habitation No. 223; from July the 1st to July 7th, in territory (naming it,) parish C, habitation 67.

Of places of habitation, one after another, indication may thus be afforded.

At any time, and so *toties quoties*, the indication given of the intended place of habitation may be changed.

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Of every such indication so given, it will be presumed, that down to the last day in each instance any missive delivered at the habitation so indicated has been received by the individual in question, with a view to the purpose for which it was sent, that is to say, in the case of a judicial mandate, with a view to compliance therewith, in such sort that for non-compliance, prehension of the body may be effected.

By any one, in the list of appropriate excuses, the individual non-complying may be originally exempted; or, as the case may be, subsequently liberated from the necessary afflictive consequences.

Such excuse may be either ordinarily emanating, or vicarious: ordinarily emanating, when from the individual himself; vicarious, when from any other person.

Of these there are three lists: —

List 1. Containing those excuses which, in the nature of the case, cannot or are not allowed to emanate from any individual other than him to whom the missive is addressed.

List 2. Containing those which cannot, in the nature of the case, or are not allowed to emanate from the individual himself, and if delivered, must have been delivered by or on behalf of some other person.

List 3. Containing those which may indifferently have emanated either from the individual himself, or from some other person.

This business of securing judicial intercourse cannot but be attended with much diversification, and considerable difficulties: which difficulties are in considerable proportion the result of the natural, as contrasted with the technical system of procedure. Under the technical system of procedure, they have no place. Why? Because, under the techical system of procedure, no suit ever finds its way into the judicatory, but through the medium of a technical assistant.

1. Difficulty the first. The individual an individual by whom an offence in some shape or other has been committed, and who, in the event of his attendance in the judicatory, would expose himself to prehension on the ground of this offence.

Resource, or say arrangement for removal of the difficulty. If the punishment, or other burthen attached to his offence, is more afflictive than privation of the benefit sought for by his attendance, he will abstain from such attendance, and the burthen resulting from non-attendance will be a part, though by supposition no more than a part, of the suffering which is his due; in the other case he will attend. The suffering in question he will undergo; but he will receive a benefit, amounting to the difference between that suffering, and the suffering to which he would be subjected by non-attendance.

In the case of him by whom a professional assistant is employed, all difficulties may be made to disappear by his consent that every missive addressed to him at the habitation of such his assistant, shall be presumed to have been received by him within the appropriate time.

The case in this respect is very different, according as it is in the character of proposed pursuer that the individual attends, or in any other character. If in the character of a proposed pursuer, the benefit expected by him to be gained by the suit is a benefit which, by any want of adequacy on the part of the indication afforded, he will be liable to forfeit, and which will accordingly operate as a security for such adequateness.

So, if it is in the character of a trustee regularly constituted, or self-constituted, that he attends. In this case, likewise, the correspondent security will have place, and by the amount of the benefit sought, will supersede the demand for an inducement of the coercive kind in any other shape.

But in every other case than this, such coercive inducement will manifestly be necessary; in particular, if the individual in attendance be a defendant, or an extraneous witness.

2. Difficulty the second. The individual in attendance, say an applicant, a person whose character is without reproach, but who, in respect of his means of livelihood, is in a state of uncertainty each day at what habitation his occupation may require him to be on the next.

In this case, he being by the supposition an applicant, he may be depended upon for doing whatsoever is in his power to save himself from being debarred from the benefit he seeks: as, for instance, giving indication of the employer or employers' habitation for whom he expects to be occupied. If his situation is so unfixed as to deprive him of this resource, the case is of the number of those unfortunate ones, for which the nature of things allows not any remedy. At any rate, this inconvenience cannot be chargeable on the natural system; for under the technical system, an individual so circumstanced would not be able to obtain any such assistance.

3. Difficulty the third. The individual in attendance is one whose attendance is the result of compulsion; he being either a defendant, or an unwilling extraneous witness.

In this case, the judge will have to choose between the evils, and act accordingly —

1. The depriving the party who is in the right, of the benefit of the attendance in question.

2. The subjecting the individual, so in attendance, to confinement, so long as is deemed necessary to the purposes of the suit.

4. Difficulty the fourth. Neither the indi-

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vidual in question, nor any person in the habitation occupied by him, able to read.

Expedient for removal, — recourse to some constituted authority, resident in the parish in which the habitation, actual or expected, of the individual in question, is situated.

§ 6. *Future-communication-securing memento.*

The person to whom this memento, signed by the judge, or, under his general direction, by the registrar, is to be delivered, is every person upon his first appearance in the justice-chamber before the judge.

The object, purpose, and use of this instrument, is the securing to the judge the means of communicating with the proposed communicant for the purpose of the suit, until the termination thereof, or until the end of the time during which it may happen to the judge to have need of such communication for the purposes of the suit. As soon as the need of communication with the intended communicant has ceased, information thereof will be afforded him by the registrar. Denomination of the instrument employed for this purpose, — *an ulterior-communication release.*

The following should be the form of the future-communication-securing memento: —

1. Mention the individual's name and description at length, to wit, surname, christian name or names, or the equivalent. Office, if a functionary; other occupation, if a non-functionary; and abode or abodes permanent, if any. Such is the description you have just given of yourself.

2. Take notice, you have declared that until, by an ulterior-communication-release, delivered as above, you have been released from the obligation of communicating with this judicatory, for the purpose of this suit (or application,) every judicial paper, if delivered at that house, will be received by you, or by some agent of yours, authorized on your behalf.

3. In consequence, except in case of legitimate excuse (of the number of those to which the serving in that character has been given by law,) you will, in the event of non-compliance with any judicial mandate, delivered or left at such your chosen place of communication, be punishable, or otherwise dealt with, as for contumacious non-compliance.

At the first bilateral attendance, it belongs to the judge to collect and complete, at the hands of the defendant, information correspondent to that which, on the occasion of the first unilateral attendance, was required to be furnished to the judicatory, and entered upon the register.

CHAPTER XI.

EVIDENCE.

§ 1. *Indicative and appropriate.*

By appropriate evidence, or ultimately employable, understand all such evidence as is fit to enter into the composition of the grounds of the judge's opinative decree, so far as depends upon the question of fact.

By simply indicative evidence, understand such as is not of itself fit to enter into the composition of those same grounds, but affords an indication of some source from whence, supposing the matter issuing from it true, evidence which is appropriate may probably be collected: — as where a person, who was not present at the place and time at which the fact in question took place, states himself as having heard of some other person as having been so present.

Widely different in investigational procedure, is the character of Roman-bred, and English-bred procedure: teeming with imperfections both of them.

As to Roman-bred procedure: throughout the penal branch of the field of law, solicitous and extensive has been the application given to such provision as it has made; in the non-penal branch, on the other hand, the provision has been comparatively scanty, the solicitude remiss.

At the same time, for want of a clear and correct conception of the difference between appropriate and simply-indicative evidence, it has given to evidence, which has been simply indicative, the effect of appropriate evidence. In the affair of Oates, for example, to such a length did this confusion proceed, that between simple indicative evidence presented to the judge, and the appropriate evidence, supposing any to exist, there were four or five portions of simply indicative evidence interposed. It has notwithstanding been received, and made to operate, as if it had been appropriate evidence. Standing before the judge, I, said A, heard from B, that he had heard from C, that C had heard from D, that he had heard from E, that E saw done, by the accused, the deed with which the accused is charged.

English-bred procedure, on the other hand, limits to the penal branch of procedure — and of that branch to no more than a part — the application of the investigational process: to the non-penal branch, it has made no application of it, how great soever may be the importance of the matter in dispute.

On the other hand, in the cases in which it employs the process, it keeps clear of the mischievous absurdity with which, as above, Roman-bred procedure has distinguished itself.

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Meantime, nothing can be more manifest than that, if necessary to the discovery of truth in the case of any one species of suit, it cannot be less so in any other.

Of the whole list of vulgar errors, few indeed are so mischievous, few so gross, as that which supposes that, in the minds of that class of men who are styled ministers of justice, minimization of injustice has been the end to which their labours have been directed: to minimization substitute maximization, you will be near the truth.

That injustice might be maximized, it has been their interest, that of the use of falsity (the general instrument of injustice) the frequency should be maximized — the falsity itself maximized — and, moreover, so also the credence given to it.

To this end it is, that to so many various descriptions of persons, on this special occasion, for this special purpose, the licence to commit judicial falsehood with impunity — in one word, the mendacity-licence — has been granted, to an extent so all-comprehensive: and to this licence, in place of punishment, reward upon the most all-comprehensive scale has been awarded.

Descriptions of persons to whom the mendacity-licence has thus been granted, are these —

1. Parties on the pursuer's side.
2. Parties on the defendant's side.
3. Professional assistants, of the order of attorneys.
4. Professional assistants, of the order of advocates.
5. The judges themselves.

Of the error just mentioned, the mischievousness consists in the support given to a system thus deleterious, by the respect with which the authors and supporters of it have down to this time been, and are at this time now regarded.

Correspondent to the mischievousness of this error is its grossness. The mischievousness of the system, so manifest to the eyes of all, so severely felt by all, yet still, in the teeth of universal experience, with very small abatement, the error continues.

More than ten years* have elapsed since, by the hand by which these lines are penning, the opposite truth has been announced in print, and not only announced, but by the most abundant, and particular, and irrefragable proofs, demonstrated.

Imputations more reproachful can scarcely be cast by man on man, than in that work† have been cast upon all implicated; yet still all is silence: and if in any case silence under accusation were confession of guilt, surely so has it been, and so continues it to be in this.

A more flagitious act of calumny could not have been committed, than would by this account have been committed, had the matter of it been other than true.

In no part of the civilized world are the name or the works of the author unknown: on no author that ever applied his labour to this field, have any such marks of approbation and applause been ever bestowed as on him. Ignorance, therefore, of the fact of the accusation, or of the prosecuting of the accusation, cannot, with any shadow of truth, be pleaded; yet still from all these quarters reigns the most imperturbable silence.

In the eyes of the people at large has this demonstration of all this guilt — this confession of guilt — been all this while manifest: the approbation and applause thus bestowed upon the author is such as to him would be sufficient reward, had he but the satisfaction of observing that the people for whom all this labour has been bestowed, and such a load of odium from the highest quarters voluntarily taken upon him, would but derive their profit from what has thus been done for them. But no such reward or satisfaction, so long as he lives, does he seem destined to receive. He pipes, but they do not dance — he makes the advances, but they do not follow. Through the paths it has been his endeavour to lead them, none are at once willing and able to follow.

§ 2. *Exclusion of party's testimony, its ill effects.*

Fertile source of injustice and oppression, the exclusionary rule which shuts the door against the testimony of the party.

Observe the consequences of the rule on the occasion of those dealings which have place, where the party on the one side is in a state of opulence, the other in a state of comparative indigence — say landlord and tenant — opulent customer and dealer — borrower and lender. The comparatively opulent man never acts, or treats of himself: everything he does is by the hand, or the help of an agent — in a word, an attorney. The comparatively indigent man, not being able conveniently to afford the purchase of any such expensive assistance, does everything by himself, and without the assistance of an attorney, deals with the attorney on the other side. Now observe the consequence: to the patrician's attorney the law secures a complete mendacity-licence; everything that he says on behalf of his noble client is evidence — good evidence. How stands it with the plebeian? Nothing that he can say on his own behalf will be so much as heard. On the part of the attorney, suppose the most palpable, the most flagrant perjury: What has he to fear for? Absolutely nothing. By no indictment for perjury, can the man who is injured

* Written in 1823. † Scotch reform.

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by the perjury have any the smallest chance for satisfaction in any shape. In the wretched shape of vengeance? Not he indeed: give his testimony he may, but no effect can it ever have. Here is oath against oath: on no such evidence will conviction be ever suffered to have place.

What is observable is, that in this source of injustice and oppression, the aristocracy as such have an obviously strong and sinister interest: whether it be in the nature of the case that they should fail of being fully sensible to the value of this sinister interest, let every one judge.

§ 3. *Evidence receivable.*

Received in every case from the applicant may be as well simply-indicative as appropriate, or say ultimately-employable evidence.

Rationale. — Reasons for the admission: —

1. The individual whose interest the evidence serves or stands to serve, may be unknown to the informant.

2. To the informant more delay, vexation, and expense, if any, may be produced by intercourse (or perhaps previous fruitless endeavours to obtain intercourse,) with persons interested, than by repairing at once to the judicatory, open as it is to him, and to everybody at all times, and provided with evidence-extractive powers, of which he is destitute.

3. A case that frequently has place is, that by fear of others on whom he is more or less dependent,—hope in like manner from others, or sinister counsel, — a person whose lawful interest would be served by giving the information which is in his power, is prevented from so doing: whereas, if, in consequence of simply-indicative evidence furnished by another person, he had, on receiving an appropriate mandate from a judge, attended and delivered his evidence, being thus seen acting under a manifest legal necessity, no such displeasure on the part of the apprehended oppressor would probably have been entertained: at any rate, it would have prevented it from producing any such evil effect as that of a denial of justice.

4. It may happen, that though the question of particular interest is between individual and individual, there has been, in the act indicated, a degree of turpitude, such, that on the account of the public it would be of use that the evil disposition of the agent should become generally known.

Particularly important is the need of simply-indicative evidence, in the case where, by the regulation for the extraction of *self-notificative* evidence, a person of bad repute would as such be naturally disinclined to pay spontaneous attendance: on the ground of the simply-indicative evidence, any such person might nevertheless be made compellable.

Simply-indicative evidence, however, although, with reference to the particular fact in question, unappropriate, will not however be to be omitted out of the record.

Rationale. — 1. It may serve either to impugn or to confirm the trustworthiness of the person from whom, in pursuance of the indication given, appropriate evidence shall have been elicited.

2. In case of criminal or culpable falsehood on the part of an indicative witness, it may be necessary for his conviction of, and punishment for that offence.

Frequently from the same source — for example, from the statement of the same person, evidence of both descriptions will come at the same time: in this case, the distinction will with particular care be to be adverted to, and held up to view by the judge.

§ 4. *Modes of interrogation to be abstained from.*

1. Fact-assuming interrogation. — In this mode, of the fact, the existence or non-existence of which is the subject-matter of inquiry and proof, the existence is assumed and taken for granted.

Example: — "At what distance were you from your friends when you fired at them?" — the subject-matter of pursuit being the alleged offence of firing a gun at those same friends.

For a question of this sort put by a judge, or without reprimand suffered by him to be put, the judge will be reprimanded, and a memorandum of such reprimand entered on the judicial-delinquency register, kept respectively by the appellate judges, and the justice-minister.

For a question so put, for the purpose of entrapping a defendant into a confession, he may be dislocated.

§ 5. *Choice as between species and species of Evidence.*

Avoid, as far as may be, all recourse to character evidence — employ it not, but where the event of the suit depends altogether upon the degree of credit given to the individual witness, to whose character objection is made.

To this purpose, consider, that in English practice the punishment of death has every now and then been inflicted on the ground of no better or other evidence than the testimony of some one individual, to whom as disreputable a character as can be imagined has at the same time been seen to belong: he at the same time being apprized that the preservation of his life depends upon his giving his testimony in a certain direction.

To the judge's notice the observation will not escape, that to the thread of character-evidence, when once begun to be spun, there is no certain termination.

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Generally speaking, where, as under this code, the power of interrogation is given to every description of person, in whose instance it affords a promise of being of use, and the exercise of it is unfettered by needless and useless rules, few mendacious witnesses will pass undetected, and any additional light that by possibility might be afforded by examination into general reputation, will be of little worth: the mode of communication at all future times with every witness being secured, and the faculty of re-examining at any time during or subsequently to the continuance of the suit in question being reserved. Under English practice, it is to the inaptitude of the whole system that character-evidence and *alibi*-evidence are principally indebted for the importance ascribed to them, and the use made of them.

Alibi evidence. — Against deception, and from evidence of this description, the judge will be in a great degree guarded, by the indispensable arrangement, the communication-securing arrangement: carried into practice, as it will be, in the instance of every individual who makes his appearance before a judge, either in the character of applicant pursuer, defendant, or extraneous witness.

This is of the number of the cases in which an adequate demand for character-evidence is most apt and likely to have place.

§ 6. *Causes of mendacity — Practice of English judges.*

Of Hudibras it is recorded thus: —

> . . . . . he scarce could ope
> His mouth, but out there flew a trope.

Of an English lawyer, and more especially of an English judge, the same thing may be recorded with much more truth and reason, though without rhyme, if for the word trope, the word lie be substituted.

The judges more especially, as being the causes that lies are in other men, may be termed with distinction, κατ' ἐξοχὴν, *the fathers of lies:* for it is by them, that from first to last, lies have not only been tolerated and uttered, but actually compelled — compelled on pain of outlawry.

If veracity be part of morality, if in mendacity there be criminality, — one of two things, to any one, be he who he may, is inevitable: — either morality itself must be an object of his contempt, or the whole tribe of English judges: they by whom, if at their instigation a man refused to defile himself by a lie, he would be punished by them as for *a contempt* — (for that is the appropriate phrase) — for contempt manifested to their authority.

Evidence immediate and intermediate, or say interventional. By *immediate,* understand a statement made by a self-alleged percipient witness, in relation to the matter of fact reported by him.

By *intermediate,* or say interventional evidence, understand a statement made by a person who is not, with relation to the matter of fact, a self-alleged percipient witness, but in relation to the matter in question has received his conception from some person, represented to him in the character of a percipient witness; to wit, either immediately, or through the medium of any number of intermediate witnesses, making a statement to the same effect the one to the other, in a chain of any length.

Uses of intermediate evidence: — 1. Serving for the procurement of immediate evidence; 2. Eventually serving in lieu of, or in addition to, immediate evidence.

Exceptions excepted, intermediate evidence will not be ultimately employable; to wit, in the character of a ground, or constituted part of a ground, for a judicial decree or mandate.

Exception is, where the alleged percipient witness is not examinable, but at the expense of preponderate evil, in the conjunct and aggregate shapes of delay, vexation, and pecuniary expense.

§ 7. *Probation.*

Probation is an operation, which in all cases must be performed on the pursuer's side, and in many instances comes to be performed on the defendant's side.

On the pursuer's side, under this system of procedure (it being the natural one,) a course of probation is complete, or incomplete and partial, as it may happen, being involved in the operation of application by and with which the suit commences.

It includes in it constantly two assertions: the matter of one of them being the matter of law, declaring the existence of a portion of the code, to this or that effect; the other having for its subject-matter fact; to wit, an individual fact, in relation to which an arrangement to the effect stated as above has been made by the portion in question of the text of the law.

Of the application, the substance and effect has been to demand at the hands of the judge a certain judicial service. This service consists in giving, on the occasion in question, execution and effect to a certain portion of the text of the code, viz. the portion just spoken of: and the warrant for the operation which the judge is so called upon to perform, is the existence of the above-mentioned matter of fact, bearing such relation as above mentioned, to the above-mentioned portion of the matter of law.

Example: — Suppose the service demanded, compensation at the charge of a defendant, for a wrong alleged to have been done by him to the pursuer, by a blow given to him on a certain part of the body. By the wrong thus done, an offence, belonging to a certain genus of offences, has been committed — a genus of

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which the denomination is, *wrongful corporal vexation.*

In this case, the matter of fact has for its alleged percipient witness the applicant himself, who, if he is to be believed, has been the immediate sufferer by the wrong.

But suppose, according to the case stated by him, the person on whose body the wrong was inflicted — the offence committed — was not the applicant himself, but a child of his, too young to be capable of stating the matter of fact.

In this case we see two distinguishable matters, or alleged matters of fact: —

1. The act by which, if the allegation be true, the blow was given: call this the principal fact.

2. The act performed by the applicant in making the allegation to this effect: call this the evidentiary fact.

By the allegation thus made, the existence of the principal fact has been provisionally, or say eventually proved: if, in the opinion of the judge, the assertion so made is true, insomuch that the principal fact asserted by it to have happened, did really happen at the time and place asserted, *i. e.* supposing him inclined to believe it; — failing proof to the contrary, he will declare accordingly. But it may be (for so the experience of the judge will have demonstrated to him,) that the allegation the applicant has thus been making is, in the whole, or some essential circumstance, untrue: by the applicant or his child, no such blow was received — or if received, received from accident, such as an unintended push by another person, or the fall of some utensil from a shelf, &c.: any of which matters of fact, the defendant might and would with truth assert, if the opportunity were given him of being heard. Relation had to the evidence so delivered as above, such evidence, if delivered by the defendant, would be counter-evidence: it may be delivered either by the defendant himself, who, in virtue of being himself the deliverer of it, would be a party witness, or say a litigant witness; or by a third person, who (not having been placed by the pursuer either on his side, in confirmation of the demand as a co-pursuer, or on the defendant's side, as a co-defendant) may be styled an extraneous witness.

But what may also be is, that all the pursuer has said is exactly true; and yet the fact thus averred, and we will suppose and say proved by him, will not be sufficient to warrant the judge in rendering to him the service so demanded, as above. It may be, that though the defendant gave him the blow, it was not till after he himself had given the defendant a blow, and that a more violent one; and that the blow so given to the pursuer had no other object than to prevent him from giving the defendant other blows, which he saw the pursuer prepared to give. Making an assertion to this effect, he will be delivering another species of counter-evidence, evidence probative of a fact, not consisting of the negative of the fact asserted by the pursuer, but of a totally distinct fact, of the positive kind, the effect of which, in respect of the destroying the ground of the demand, would be the same as that of the just-mentioned negative one.

§ 8. *Evidence as to character.*

By evidence as to character, or say character-evidence, understand evidence having for its subject-matter the aptitude of the individual — aptitude, moral, intellectual, and active, with relation to the part acted or proposed to be acted by him in the suit; whether it be that of — 1. Party-pursuer; 2. Party-defendant; or 3. Extraneous witness.

Case the 1st, that of a party on the pursuer's side.

On the subject of the aptitude of the individual to be received in the character of pursuer, no evidence will be received. Reason: No person should be excluded from the capacity of demanding remedy in every shape, from wrong in any shape.

Case the 2d, that of a party on the defendant's side.

On the subject of the aptitude of an individual to be received in the capacity of defendant, no evidence will be received. Reason: No person should be excluded from the capacity of preserving himself from undue burthen, on the score of remedy for wrong alleged to have been done by him; if he were, he might be wrongfully subjected to whatsoever suffering is ordained by law to be inflicted, whether for the purpose of satisfaction, or the purpose of punishment.

Case the 3d, that of an extraneous witness.

In the first instance, exception excepted, no evidence will be received in relation to the character of an extraneous witness.

Exception is, where the proposed witness has been convicted of judicial falsehood, criminal or culpable, or say with evil consciousness, or through culpable inattention. In such cases, use may be made of the record in which such conviction is recorded; and this without other reference than the inspection of that record on the spot, or the procurement of it through the letter-post.

In the case when, of two witnesses the evidence being irreconcilably contradictory, and the decree as to the question of fact depending on the credence given to the one or the other, — if, in relation to one of the witnesses by a party on either side, declaration is made that he is generally regarded as a person in whom mendacity is habitual, power to the judge to elicit evidence in proof of the untrustworthiness so alleged.

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But in the exercise of this power he will be guided by the consideration of the importance of the subject-matter in dispute, compared with the expense, delay, and vexation likely to result from the elicitation of the mass of evidence, the elicitation of which is likely to be on sufficient grounds demanded.

Why, in ordinary cases, put an exclusion upon character evidence?

Answer: For the reason that the effect of any evidence, in affirmance even of habitual mendacity, will not be to produce the exclusion of the individual in the capacity of a witness: sole effect, that of producing an opinion in affirmance of a corresponding degree of comparative untrustworthiness on the part of his personal evidence.

For this opinion, the utmost ground that can be afforded cannot amount to anything more than as a weakly operating article of circumstantial evidence. It follows not, that because a man has uttered wilful falsehood, in cases where in case of mendacity no punishment awaited him, he would, in anything like to an equal degree, be likely so to do in a case in which by such mendacity he exposed himself to the punishment appointed by the law for that crime.

Boundless is the delay, expense, and vexation which it would be in the power of a *mala fide* litigant to necessitate, if an unlimited right of calling in evidence for this purpose were established.

Boundless the number of witnesses whose evidence might be called in, in the first instance; for the need would be variable according to the importance of the matter in dispute, and the difficulty attendant on the question of fact, with or without other circumstances. Incompatible with any well-grounded decision on the question regarding evidence, would be every attempt to fix the allowable number of character-witnesses, by any general rule.

But if, in the first instance, no well-grounded limits could be put to the number of mendacity-imputing witnesses, as above, so neither could there be to the number of mendacity-imputing witnesses, whose evidence was demanded for the purpose of imputing mendacity to any or all of the first set, of mendacity-imputing witnesses. Here, then, might be a second set— thence a third set — and so on; the number increasing in a geometrical ratio.

To an assertion imputing habitual mendacity to a man — to an assertion to this effect, how decidedly soever mendacious, no punishment, as for mendacity, could be attached, unless asseveration of individual acts of mendacity, as having been committed on so many individual occasions, were received. But to give acceptance to such asseverations, would be to include in the bosom of this suit, the procedure in relation to as many distinguishable suits as those acts of mendacity so imputed; for as in other cases, so in this: if criminative or inculpative evidence were received, how, consistently with justice, could excriminative or exculpative evidence be excluded?

By the vexation which, on the part of the witnesses themselves, would be attached on the elicitation of their evidence, a proportionable objection to the elicitation of it would be afforded. As to compensation — out of no other pocket than that of the inviting party could it come; and in this case the benefit of it would be allotted exclusively to the relatively opulent, to the exclusion of the relatively unopulent.

Existing system.—It admits of character-evidence, not only in relation to extraneous witnesses, but in relation to parties defendant; not only of the dyslogistic, including the mendacity-imputing cast, but of the eulogistic cast: and altogether boundless is it, as to number: and without exception as to quality is it, as to the persons whom it renders consultable.

CHAPTER XII.

INITIATORY HEARING.

§ 1. *Commencement of a Suit.*

EVERY suit must have its commencement: in this circumstance all suits agree. But different sorts of suits, or suits of the same sort, may be commenced in any one of a considerable variety of modes.

Under the present proposed code, every suit takes its commencement in the same manner: personal application made by some individual to the judge; for, to the judge, and to him alone, belongs the power to give execution and effect to it. This accordingly may be styled the natural system of procedure.

Sooner or later, at some time or other, an application by somebody to the judge (unless he himself will give commencement to the suit,) cannot but be made. But if made at all, at what other period can it with so much propriety be made — be made with so little danger of substantial injustice, with so little of evil in the shape of expense, vexation, and delay? The expense is minimized; for the sole expense is that of the applicant's time: vexation is minimized, for to no individual is vexation in any other shape produced; and, in the case of that individual, the vexation is more than compensated for, or he would not inflict it on himself: delay is also minimized, or rather at this point it is excluded.

In no other mode can commencement be given to a suit, without a mass of evil in the

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united shapes of expense, vexation, and delay, to which there are no bounds.

To commencement in this mode (if this be the mode throughout the territories of the state,) a multitude of judicatories, stationed with reference to facility of approach to applicants, are evidently indispensable. But whatever be their number, it follows not, that in the mode of procedure (military judicature being out of the question,) any the smallest difference should have place.

Under the English judge-made law, not only different sorts of suits, but in different judicatories, suits of the same sorts, take their commencement in a variety of different manners.

In all these judicatories, the mode of commencement agrees however in this; to wit, that the suit does not commence by personal application made by any individual to the judge. Should any such application be made, it would be instantly, and not without indignation, refused — a refusal with indignation, which, were the application made in secret, would beyond dispute be justifiable and indispensable.

Two different modes of commencement are here distinguishable:—1. Non-penal, styled civil; and, 2. Penal. In the civil, moreover, may be distinguished, two sub-modes—the common-law mode, and the equity mode.

The common-law mode is that pursued in the common-law judicatories; to wit, the King's Bench, the Common Pleas, and the common-law side of the Exchequer.

In all cases, the object being to put money into the pockets of the judges, to that object, and that alone, except the like benefit to the other members of the firm of Judge and Co., the mode of procedure is made subservient. In Westminster Hall and its purlieus, Judge and Co. keep open shop. For the profit upon the expense, they sell to every individual that will pay the price of it, the power of imposing expense and vexation to an amount more or less considerable — to any person, and any number of persons, or purchasers, as may choose — at whatever distance it be from the shop, so it is within the limits of the English part of the kingdom. To this shop, the plaintiff who has suffered wrong is forced to make application, and thus add suffering to suffering ere he can begin to take his chance for relief. The plaintiff whose object is to do wrong, employs the hand of the judge as an instrument, and having paid the price of it, is then enabled to commence the career of wrong, heaping suffering upon suffering, until the measure of intended wrong is filled, and the proposed quantity of suffering produced.

At these same shops are sold, in this shape, with the exception of certain privileged classes, the personal liberty of every man, to whoever would pay the price, down to a certain time within the memory of men now living, without other condition than that of paying the price; since that time subject to a condition, which, while it diminishes the evil in extent, gives increase to it in magnitude. The seizure of the person cannot take place without a previous written instrument, consisting of a declaration made by the plaintiff, and sanctioned by an oath, affirming the existence of a pecuniary demand on his part, to a certain amount on the score of debt.

Of the founders and supporters of this system of law, the morality may be seen in the length of time during which this unlimited sale of this unlimited power of oppression continued to be carried on: and also in the inadequacy of the remedy to its professed purpose. Instead of being creditor to his intended victim, the plaintiff may be his debtor to an unlimited amount; and still, without incurring the professedly threatened penalty, he may work the intended wrong. By a word or two, the form of working it with impunity could have been refused to every plaintiff, who could not prove himself creditor upon the balance. To mischief, working by Judge and Co., matters are so ordered, that by no hand can remedy be applied other than that of Judge and Co. It is, accordingly, on every occasion, sure to be as secure and as fertile in ulterior mischief as the craft can make it. In parliament, by no hand but by that of a lawyer, can relief to any oppression, of which law is the instrument, be applied. If no one appears, the bill is of course rejected; scorn and contempt being at the same time the reward of the benevolent hand by which it was presented. I am not prepared, says the chief of the king's long-robed creatures in the House of Lords — I am not prepared; and in this situation the non-preparation has the effect of the king's negative.

§ 2. *Initiatory application, litiscontestational.*

The applicant being established in the character of a litiscontestational applicant, or say pursuer, and a correspondent memorandum entered on the register, the judge will have to consider the next operation, or assemblage of operations, which the nature of the case requires at his hands.

These operations may be either operations affecting persons alone, operations affecting things alone, or operations applying to persons and things.

Exceptions excepted, the next operation will be performed by the issuing of—1. A proposed defendant's attendance-requiring mandate. In case of defendants more than one, an attendance-requiring mandate for each one. 2. A proposed defendant's examination-mandate, or say *examination-paper;* and so where there are proposed defendants more than one, defendants' examination-paper addressed to

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each; the proposed defendant being, in this case, the only person addressed in the first place.

Exceptions are, when in consideration of the state of the case, as resulting from the examination of the applicant, as entered in the record it appears to the judge that the purposes of justice are more effectually accomplished by the simultaneous or previous issuing of an attendance-requiring or examination mandate, as the case may appear to require, addressed to a proposed co-pursuer, or to a supposed evidence holder, and proposed furnisher of evidence, personal, real, or written, or of all three sorts, or of any two thereof, as the case may be.

In case of need, in lieu of an attendance-requiring mandate, the judge may, in the case of any one or more of such persons, issue a prehension mandate.

Of the need of a prehension mandate, in lieu of an attendance-requiring mandate, at the charge of the proposed co-pursuer, an example may be found where, in relation to the service required at the hands of the judge, the proposed co-pursuer has an interest conjoint with that of the applicant; but an apprehension exists, lest, through indolence or fear of resentment, at the hands of a proposed defendant, the proposed co-pursuer might be induced rather to give up the pursuit of such his interest, than join in the pursuit of it.

Note, that if the apprehended non-pursuit would have for its cause fear of resentment, as above, it may be for the advantage of the proposed co-pursuer, that his junction with the applicant pursuer should appear to be the result rather of inevitable necessity, than of consent.

Of this need of a course taken for causing the attendance, or even response, on the part of a proposed co-pursuer, antecedently to attendance or response on the part of a proposed defendant, or even to the issuing of a mandate for the procurement thereof respectively, the same example may serve.

Of the need of an attendance-requiring, or a prehension mandate, at the charge of a supposed evidence holder and proposed evidence furnisher, examples are the same as in the case of a proposed co-pursuer; and the reluctance on both accounts will be more apt to have place.

In regard to attendance-requiring or prehension at the charge of a proposed evidence furnisher, the question for the consideration of the judge will be, by which course the greatest detriment would accrue to the interest of both parties and the public; to wit, by the vexation attached to the furnishing of the evidence, or by the danger of a decision adverse to the interest of the applicant-pursuer for want of the evidence so desired.

Of the vexation attached to the furnishing of the desired evidence, the quantum will be considered on each of two suppositions; to wit, absence of compensation, pecuniary or quasi-pecuniary, and receipt of compensation in such quantity and quality as the judge may think reasonable, and the applicant pursuer able and willing to allow.

On the occasion of such allowance, it will also be for consideration what, if any, ground there is for the expectation, that in the event of the pursuer's succeeding in his demand, it will be right (the pecuniary and other circumstances of the proposed defendant considered,) and practicable at the same time, consistent with justice, that the burthen should be transferred from the shoulders of the pursuer to those of the defendant.

To this purpose, a circumstance pre-eminently material will be the importance of the proposed evidence-furnisher's evidence, with relation to the event of the suit. The case in which this importance will be in the highest degree, is that where, for the proof of the supposed fact, the nature of the case does not at the time in question afford any evidence other than his. Next comes that in which, in interest or supposed affection, the supposed evidence holder and proposed evidence furnisher, is apprehended to be adverse to the pursuer's person, or to this his demand.

The greater the number of the persons capable of furnishing the evidence required, and the more material the evidence in the instance of each, the less will be the need for taking the more vexatious course for the procurement of their evidence respectively.

For the more effectual avoidance of needless delay, or vexation and expense, — out of the whole number of supposed evidence holders proposed to him, the judge may take for examination in the first instance any lesser number, reserving to himself the power of doing the like in the case of any additional number; and this not only at a time anterior to that of the defendant's answer, or personal attendance, as the case may be, but even at a time posterior, not only to that of the defendant's response or attendance, but to the time of his having furnished evidence from extraneous and non-litigant witnesses.

§ 3. *Reiteration of suits — none.*

Previously to the giving admittance to the applicant in the character of pursuer, the judge will examine him as to the having made the same demand by application to any other judicatory.

Exceptions excepted, — in respect of no suit which has been terminated, or is pending in any judicatory, shall application be made by any party, on either side, to any other than the appropriate appellate judicatory.

For in this case, such fresh suit would, if

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suffered to be entertained, have the effect of an appeal.

Exceptions may be when, after the termination of a suit in an immediate judicatory, whether without appeal or with an appeal, evidence, the existence of which the applicant had no knowledge or suspicion of, has been made known to him: at the same time that for the elicitation of the aggregate mass of appropriate evidence, including that which had been elicited in the course of the former suit, in the judicatory thus applied to in the second instance, the suit may be carried on, and terminated in a manner more conformable to the ends of justice, direct and collateral together, taken in the aggregate, than in the judicatory in which, in and by the first suit, it received its termination.

On an occasion of this sort, by the examination of the applicant, the judge will obtain satisfaction in relation to the facts, from which it will appear, on the side of which judicatory the balance is, in respect of preponderate convenience.

If, of the evidence thus adduced, the effect be that of counter-evidence, in relation to a *principal*, decided upon on the occasion of the former suit, the judge will use his discretion as to the taking for the ground of his decision in addition to the fresh body of evidence, the evidence elicited on the occasion of the former suit, as exhibited in the record, or re-eliciting the evidence elicited on that former occasion; or, after eliciting the fresh evidence, referring the applicant to the judicatory in which the suit received its termination in the former instance.

In case of his determining to employ the evidence elicited in the former suit, an exemplar of it will, of course, unless mislaid or lost, or wilfully destroyed, be already in the possession or power of the applicant.

In contemplation of this contingency, if the stock of such exemplars (eight in number which are as many as are capable of being in equal perfection taken at once) be not exhausted by other more certainly needful demands, there may be a use in furnishing the party or parties on both sides, with additional exemplars respectively.

It may be, that by a party in whose disfavour, (though as far as the mass of evidence actually produced is considered on sufficient grounds) the suit received its termination, expectation of being able at some future time to exhibit a piece of evidence, not at that time in his possession, power, or even knowledge, may be entertained. In this case it will rest with him to request of the judge for this purpose a spare exemplar, and with the judge to grant or refuse it according to circumstances as above.

If the fresh evidence, as announced, do not contain in it any evidence of a nature to operate as counter-evidence in relation to a principal fact *evidenced to*, — a principal fact of the number of those, to the probation of which evidence was employed in the former suit; but only evidence in support of a *counter-fact*, that is to say, a fact constituting, or helping to constitute, a decision opposite to that come to in the former suit; — in such case the judge will not entertain any objection to the decision come to as to the matter of fact in the former case by the other judicatory: but in relation to the evidence adduced as proof of the counter-fact, he will pronounce such opinion as appears to him well grounded, and therefore and thereupon, such imperative decree as the case requires, in affirmance or disaffirmance of the decree pronounced on the occasion of such anterior suit.

On this occasion, as on every other in which a fresh suit is endeavoured to be commenced on the ground of evidence alleged to have been discovered not till after the elicitation of the evidence in the course of the former suit, the judge will with particular attention scrutinize into the truth of the allegation, lest by needless reiteration of suits, danger of misdecision or delay, vexation and expense, should, by evil consciousness, negligence or temerity, be increased.

It may be, that after the decease or incapacitation of him who was pursuer or defendant in the former suit, discovery of fresh material evidence may have been made, or may be alleged to have been made, by the post-obituary, or other representative of the party in that former case. In this case it may naturally happen, that the knowledge of what passed on the occasion of the former suit is not so perfect and adequate on the part of the representative, as it would have been on the part of the principal: and in particular what may happen is, that though the spare exemplar had been obtained by the principal, neither of the one nor of the other is the existence known to the representative.

For the ascertaining the fact of the existence of such anterior suit, the judge will, in case of doubt, address himself by an appropriate instrument — an *information-requesting address*, to any such judicatory or judicatories as the occasion shall have suggested to him as likely to possess the information needed.

§ 4. *Demand-Paper.*

In the demand paper will be inserted the denomination of the offence, to which it appears that the act is referable.

As in numerous instances the offences run into one another in such sort, that the same individual act may without impropriety, be susceptible of several denominations, — or it may as yet be matter of uncertainty to which of several the evidence may, on judicial ex-

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amination be found to apply — divers offences may to this purpose be named in the disjunctive.

When the demand paper is brought ready filled up under the proper heads, time will so far be saved, and trouble saved to the judge: it will in this case have been the work of the pursuer, or his legal advisers.

In the case where an uninformed and unassisted individual comes to tell his story to the judge, it will belong to the judge, upon taking his examination, to fill up the demand-paper.

As the supposed facts come out in the course of the examination, the denomination of the offence may from time to time be amended *toties quoties:* offence or offences struck out — offence or offences added.

By the same person, to the same person, wrong in an indefinitely numerous variety of shapes, each of them characterized by the denomination of an offence, may have happened to have been committed. By one and the same lot or mass of evidence, it may happen to it to have been substantiated; by decision pronounced on all the demands at the same time, delay, vexation, and expense will be minimized.

Thus, by the multitude of the instances of wrong, no room is afforded for the giving impunity in any of them.

In this case, whatsoever has been the number of the wrongs committed, each productive of its separate mischief, so many separate demand papers may there be.

It may be, that in regard to several wrongs committed on the same day, by the wronger on the wronged, in the instance of one or more of them, the wronger has had one or more accomplices; in another, others; in another, none. Out of this circumstance arises a farther demand for separate demand papers.

DEMAND-PAPER A.

Demand and suit simply requisitive — not inculpative.

Heads, under which the matter of a pursuer's demand is to be stated for the purpose of the judge's determination, whether to call upon any person, in the character of a proposed defendant, to comply with the demand, or contest it: —

I. Pursuer or pursuers, who.

Heads under which entries are to be made in relation to each: —

1. Sex.

2. Condition in respect of marriage, viz. whether, I. Never married; II. Widow or widower; III. Married.

3. Age. Time of birth, if not exactly known, according to conjecture; if exactly known, year, month, and day of the month.

4. Birth-place; whether within or without the territory of the state: if within, mentioning the district, subdistrict, and bis-subdistrict.

5. Occupation — or occupations: profit-seeking, if any, what; so, official.

II. Means of intercourse for the purpose of the suit.

1. Habitation, to which a mandate or other message from the judicatory may be directed with assurance of its being received, — the habitation being identified, as per Election Code. On every change, the information under this head will have to receive a corresponding change.

III. Effective service demanded.

This is that which is performed by concurrence in the division of the subject-matter, of one inchoate and ineffective, into a number of consummate and effective rights; to wit, by the correspondent judicial service.

N. B. The right to an as yet unliquidated portion of an aggregate mass of property, is an inchoate and ineffective right as to every part of it: the right to any such part, when, by an act of the judge, separated from the rest and conferred on a demandant, to be by him possessed in severalty, is a consummate and effective right; the exercise of it not requiring any ulterior act on the part of the judge.

For the list of the cases in which, to render it as above effective, a right requires a corresponding act or set of acts on the part of the judge, see — the *Right-conferring Code*, or say, the *Non-penal Code*.

IV. Collative portion of law relied on.

Under this head, mention will be made of the code, chapter, section, and article, in which inchoate rights of the sort in question are mentioned, with the cases and modes in which they may be rendered consummate.

V. Collative fact alleged.

This will be an individual event, or state of things, of the number of those which, in virtue of the correspondent collative portion of law, have the effect of giving to the person in whose favour they have place, the right to demand the effective service of the sort in No. III. mentioned. Example: —

P. E. being possessed of a portion of land called Springfield, situated in the bis-sub-district called Highbury, having four children, of whom the pursuer D. E. is one, died, to wit, on or about the 1st of January 18 ; whereby, under the law, as per No. IV. the pursuer is entitled to demand at the hands of the judge, one equal fourth part of the said portion of land, and at the hands of the other three, their concurrence in the division so to be made.

VI. Co-demandant or demandants, — none. Proposed defendants — A.E., B.E., and C.E., co-interessees with D. E. as above.

VII. Evidence looked to in proof of the collative fact alleged, as per No. V. personal: the declarations expected from the mouths of C. G., E. H., and M. R., who were present at the death.

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VIII. Ablative fact, none. Example:

1. To no person had the deceased transferred the said land, or any part of it.

2. No statement had he made, ordering any other disposition to be made of it.

IX. Counter-evidence,—none—no person either entitled or disposed, by oral judicial statement, or otherwise, to deliver evidence, in contradiction to the legitimacy of the pursuer, or the death of the person hereby alleged to be dead.

X. Counter-demand, — none. No person has, or conceives he has, any demand upon the pursuer, of such sort as to disqualify him from making this demand.

XI. Judicial service demanded. This service consists in the issuing and giving execution and effect to such judicial mandates as shall be requisite and sufficient to put the pursuer in possession of his said equal fourth part of the said land.

This case is the one first brought to view, as being, in appearance at least, the simplest. But it is one by which but a small part of the field of law, substantive and adjective together, is covered. It is, however, the sort of case by which the greatest variety of complication is exhibited; and in which the mass of unavoidable delay, vexation, and expense is apt to be maximized.

DEMAND-PAPER B.

The demand inculpative, but not criminative.

Heads under which the matter of the pursuer's demand is to be stated for the purpose of the judge's determination, whether to call upon any person, in the character of a proposed defendant, to comply with the demand, or to contest it: —

I. Pursuer or pursuers, who.

Heads under which entries are to be made in relation to each: —

1. Sex. — 2. Condition in respect of marriage, viz. whether, I. Never married; II. Widow or widower; III. Married. — 3. Age. Time of birth, if not exactly known, according to conjecture: if exactly known, year, month, and day of the month. — 4. Birthplace, whether within or without the territory of the state; if within, mentioning the district, subdistrict, and bis-subdistrict. — 5. Occupation or occupations: profit-seeking, if any, what; so, official.

II. Means of intercourse for the purpose of the suit.

1. Habitation, to which a mandate, or other message from the judicatory, may be directed, with assurance of its being received, the habitation being identified, as per Election Code.

On every change, the information under this head will have to receive a corresponding change.

III. Effective service demanded; to wit — Appropriate satisfaction for some wrong alleged to have been done to the pursuer by the proposed defendant; that is to say, for some individual act, productive of damage in some shape to the pursuer, and as such at least culpable; belonging to some one of the sorts of offences mentioned under the head of private offences, or offences against individuals, in the wrong-restraining, or say, the Penal Code; mentioning the name of the sort of wrong, with the chapter or chapters, section or sections, and article or articles, in which the description of it is given, together with that of the sort of satisfaction provided in respect of it.

IV. Collative portion of law relied on by the pursuers.

This will consist of the article or articles referred to, in the manner in No. III. particularized. It is called collative, in respect of its conferring on the pursuer the right to the effective service demanded, as per No. III. Collative with relation to the pursuer's title to the service, as above, demanded by him, — it will, with relation to the burthen imposed on the defendant, by the obligation of rendering that same service, be *onerative*.

V. Collative fact alleged.

This will be the committal of an individual act, of the sort of some one of those mentioned in No. III.

VI. Co-demandant or co-demandants, if any, and proposed defendant or defendants.

Those persons, to wit, who, by the pursuer are looked to in those several capacities; with their several descriptions, as per No. I.: also the means of intercourse with them respectively, as far as known or believed, as per No. II.

VII. Sources of the evidence looked to in proof of the collative fact alleged, as per No. V.; to wit,

Such persons, together with such writings, and such other things, if any, as the pursuer looks to, in that character, for support to his demand. The evidence itself will remain to be elicited at the hearing, from those its several sources.

VIII. Ablative facts negatived.

Of any adequate ablative fact, the effect will be, in every case, to take away any right conferred by a collative fact. The affirmance of the non-existence of all such ablative facts must therefore be exacted, as well as the affirmance of the existence of a collative fact, as per No. V., and thence of a right to the effective service demanded, as per No. III.

Ablative with relation to the pursuer's title to the service demanded by him, — with relation to the burthen imposed on the defendant by the obligation of rendering that same service, it will be *exonerative*.

IX. Counter-evidence, if any, from what sources expected. Counter-evidence, or evidence either in disproof of a fact which, with reference to the pursuer's demand, is a

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collative fact, as per No. V., or in proof of a fact which, with reference to it, is an ablative fact, as per No. VIII.

X. Counter-demand, whether any, and if any, what, according to the knowledge or belief of the pursuer, declared: counter-demand, to wit, a demand on the part of the proposed defendant, at the charge of the now pursuer. Any such counter-demand, if just, will, according to the value of it, compared with that of the corresponding effective service, as per No. III., take away the pursuer's right to it.

But it will not afford, as an ablative fact would, a ground for the dismissal of the demand: only for doing away, or lessening the amount of, any preliminary security which might be needful for securing execution to the collative law, as per No. IV., and thence to the pursuer the benefit of the effective service.

XI. Judicial service demanded.

This will consist in the performance of all such judicial acts as will be necessary to the effective service, as per No. III., to be rendered.

DEMAND-PAPER C.

Demand criminative, — Offence, case and suit, penal, and publico-private.

I. Pursuer, with description and means of intercourse, as before.

II. Effective service demanded: —

I. By the individual wronged, —satisfaction, to wit —1. The restitution of an article of property, furtively taken; 2. Money, in compensation for the loss, and vexation and expense occasioned by this pursuit.

II. By the government advocate, — the service that will be rendered to the public, by the defendant's being made to suffer the appropriate punishment; to wit, by the tendency of such punishment to restrain others from the commission of the like offences.

III. Collative law invoked, — the law by which, for theft, a man is rendered as above, satisfactionally, and moreover punitionally responsible.

IV. Collative fact alleged,— the act of theft, whereby the article was stolen by the proposed defendant.

V. Defendant,—A. L, inmate of the habitation No. 4, in Cross Street, in the town of Woolton, in this subdistrict, labourer.

VI. Evidence, — personal. The statement ready to be declared by me the pursuer, who saw the act of theft committed by proposed defendant, and who, having prehended him, have brought him hither.

VII. Counter-evidence, — none. Neither the proposed defendant nor any other person can, to my knowledge or belief, allege with truth, anything in contradiction to No. IV.

VIII. Ablative facts, none. No fact whatever, can in the character of an ablative fact, apply to this case, unless where (with reference to punishment,) evidence of one codelinquent may have been offered, with or without reward, for the discovery of another or others.

IX. Counter-demand. None applies to this case.

X. Judicial service. This will have two branches, correspondent to those of the demand: —

1. Service to the individual wronged, by causing the stolen goods to be restored to him by the thief, together with money obtained by the loan or sale of any such property, immoveable or moveable, as he may happen to have, in compensation for the private wrong, as above; to wit, by the several appropriate judicial mandates.

2. Service rendered to the public, by the issuing of any such incarceration or other punitional mandate, by the execution of which the imprisonment or other punishment may be inflicted.

Of the case where the demand is in its nature invariable, examples are as follows: —

1. Subject-matter of the demand, — the entire property of this or that individual thing moveable — as a beast, or article of furniture, &c.

2. Or of a thing immoveable — as a house with the appurtenances, a piece of land, &c.

Of the case where the subject-matter of demand is in its nature variable, examples are — all cases in which money is demanded in compensation for wrong sustained.

DEMAND-PAPER D.

The demand either criminative or inculpative. Offence, suit and case, penal and purely public.

Heads under which the matter of a pursuer's demand is to be stated, for the purpose of the judge's determination whether to call upon any person, in the character of a proposed defendant, to comply with the demand or to contest it: —

I. Effective service demanded. This is the service which, in the event of his being proved guilty, will be rendered to the public, by the defendant's being subjected to the punishment incurred by the collative fact No. III. in virtue of the collative law No. II.

II. Collative portion of law relied on. This will be the portion by which the character of an offence is given to a sort of act, in which the individual act charged upon the proposed defendant, as constituting the correspondent collative fact, is comprehended. It is termed collative, in respect of its being regarded as conferring on the pursuer, in behalf of the public, the right to the effective service demanded, as per No. I.

III. Collative fact alleged.

This will be an individual act, charged upon the proposed defendant, as compre-

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hended in one of the sorts of acts to which the character of offences is given by the collative law, No II.

Collative with relation to the pursuer's title to demand the effective service as above demanded by him, — it will, with relation to the burthen imposed upon the defendant by the obligation of rendering that same service, be onerative.

IV. Proposed defendant or defendants, with their several descriptions, as far as known or believed, together with the means of intercourse with them respectively, for the purpose of the suit, under their several and respective heads.

V. Sources of the evidence looked to, for the proof of the collative fact alleged as per No. III.; to wit, such persons, together with such writings, and such other things, if any, as the pursuer looks to in that character for support to his demand. The evidence itself will remain to be elicited at the hearing from those its several sources.

VI. Ablative facts negatived. Of any adequate ablative fact, the effect will be, in every case, to take away any right conferred by a collative fact. The affirmance of the non-existence of all such ablative facts must therefore be exacted, as well as the affirmance of the existence of a collative fact, as per No. III., and thence of a right to the effective service demanded as per No. I.

Ablative with relation to the pursuer's title to the service demanded by him, these facts will, with relation to the burthen imposed on the defendant by the obligation of rendering that same service, be exonerative.

In the case of a criminal offence, collative circumstances will be — the several inculpative, criminative, and aggravative circumstances, belonging to the description of the act: ablative, the several justificative, exemptive, and alleviative circumstances. For exact lists of all these several sorts of circumstances, see the Penal Code.

VII. Counter-evidence, if any, from what sources expected.

Counter-evidence is evidence either in disproof of a fact which, with reference to the pursuer's demand, is a collative fact, as per No. III.; or in proof of a fact which, with reference to it, is an ablative fact, as per No. VI.

VIII. Judicial service demanded. This will consist in the performance of all such judicial acts as will be necessary to the causing the collative portion of law, as per No. II., to receive, at the charge of the defendant, its execution and effect; and thereby the effective service, as per No. I., to be rendered.

DEMAND-PAPER E.

The demand either criminative or inculpative. Offence, suit and case, penal, and publico-private.

Heads under which the matter of a pursuer's demand is to be stated, for the purpose of the judge's determination whether to call upon any person, in the character of a proposed defendant, to comply with the demand or to contest it: —

I. Private pursuer or pursuers, who.

Heads under which entries are to be made in relation to each: —

1. Sex. — 2. Condition in respect of marriage, viz. whether, I. Never married; II. Widow or widower; III. Married. — 3. Age. Time of birth, if not exactly known, according to conjecture; if exactly known, year, month, and day of the month. — 4. Birthplace, whether within or without the territory of the state; if within, mentioning the district, subdistrict, and bis-subdistrict. — 5. Occupation or occupations: profit-seeking, if any, what; so, official.

II. Means of intercourse for the purpose of the suit.

Habitation to which a mandate, or other message from the judicatory, may be directed with assurance of its being received; the habitation being identified as per Election Code. On every change, the information under this head will have to receive a corresponding change.

III. Public pursuer, on behalf of the public — the government advocate.

IV. Effective services demanded at the charge of the proposed defendant.

1. By the pursuer, as being the individual wronged, — satisfaction; to wit, for the damage occasioned to him by the wrongous act, which, with respect to the right to satisfaction, has become the collative fact, as per No. VI., having been constituted such by the collative portion of law, No. V.

For the several shapes in which, for damage received, from the several sorts of wrongous acts or offences, satisfaction will be obtainable, see the Penal Code, under the head of the several sorts of offences against individuals.

2. By the government advocate, in his quality of public pursuer, — the subjection of the defendant to the punishment incurred by this same act.

By the suffering produced by the infliction of the punishment, a service is regarded as being rendered to the public, by means of the tendency which the eventual fear of it has to prevent the commission of the like wrongous acts in future.

V. Collative portion of law relied on.

This will be the portion of law by which the character of an offence is given to a sort of act, in which the individual act charged upon the proposed defendant, as contributory to the corresponding collative fact, as per No. VI., is comprehended. It is termed collative, in respect of its conferring on the respective pursuers, as per Nos. I. and III.,

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the right to the respective services, as per No. IV.

VI. Collative fact alleged.

This will be an individual act, belonging to one of the sorts of wrongous acts spoken of under No. IV., and as being constituted offences by the collative portion of law, as per No. V.

Collative with relation to the title of the pursuers to the service, respectively demanded by them, — it will, with relation to the burthen imposed on the defendant by the obligation of rendering these same services, be onerative.

VII. Proposed defendant or defendants, with their several descriptions, as far as known or believed, together with the several means of intercourse with them respectively for the purpose of the suit, under the several heads in No. I. and II. mentioned.

VIII. Evidence looked to, in proof of the collative fact, as per No. VI.

Under this head will not be to be entered on this paper anything besides the *sources* of the evidence known, or supposed to be obtainable; to wit, such persons, together with such writings, and such other things, if any, as the pursuer looks to in that character for support to his demand.

The evidence itself will remain to be elicited at the hearing from those its several sources.

NOTES TO DEMAND-PAPER A.

[Sources of Evidence.] On the evidence which will have to be adduced, will depend the belief of the judge in affirmance of the existence of the collative fact or facts, of which the applicant's title, on the ground of fact, to the services demanded by him, is composed. In relation to this same evidence, among the questions which, in that view, the pursuer will have had to put to himself, and whereby, in so far as he has failed so to put them to himself, the judge will have to put them, are the following: —

1. Questions as to *personal* evidence. What person or persons are looked to, as able and willing, or capable of being lawfully made willing, in quality of testifier, to prove the existence of the collative fact or facts? In particular — 1. The applicant or applicants? 2. The proposed defendant or defendants? 3. Any other person or persons? or any mixed assemblage, composed out of the three sorts of testifiers, whereof the two first will in such case be *litigant*, the others *extraneous*, testifiers or narrating witnesses?

2. Questions as to *real* evidence, — to wit, as to any state of things, unmoveable or moveable, to which it may happen to be capable of operating in the character of evidence, or proof, or explanation of a collative fact. The things, what and where; present possessors or keepers, who? In particular, the applicant or applicants — defendant or defendants — or third persons, as above? Note that, in respect of any appearance his body exhibits, *a person* may, as well as *a thing*, constitute a source of real evidence: a person, for example, on whose body the mark of a wound or bruise is visible.

3. Questions as to *written* evidence. Written evidence is a sort of compound evidence, composed of personal and real. To the questions, Who the persons are of whose discourse the writing is composed? will accordingly be to be added the question, Who the persons are in whose possession or keeping the portions of discourse in question are.

Of this note on the subject of evidence, the matter will be seen to apply, not less to the Demand Paper A, than to all the several others.

[Ablative facts.] By some one article in the list of the facts constituted collative facts with relation to the right or title of a pursuer (standing in the individual situation of the pursuer in question) to receive the services hereby demanded, must such his right or title have been conferred: by any one article in the correspondent list of ablative facts, it may have been taken away. Therefore, of all such ablative facts, the existence must of necessity be negatived by him.

Case I. Suit simply requisitive.

Of the proprietor of a mass of property, the death operates as a collative fact in favour of each of his postobit successors: as a collative fact, to wit, with relation to the right to the service rendered by the judge, by making a division of the mass among such successor and his co-interessees, and thereupon giving to him his share. Examples of an ablative fact are — 1. A release by any one such co-interessee in favour of the rest, or any one of them; 2. On the supposition of the deceased's having a correspondent right, exercise given by him to any ablative power, divesting this or that one of them of his right to any such share.

NOTES TO DEMAND-PAPER B.

[Inculpative, but not criminative.] In this case will require to be included the case which, in Rome-bred law in general, and in Bonaparte's Civil Code in particular, is styled that of a *Quasi-delictum* — *Quasi-délit*, Cod. Civ. L. III. Tit. IV. Ch. II. Art. 1382 to 1386, p. 217. This is the case where, without any default of his own, a person is rendered responsible for damage — having for its efficient instrument some person for whom, or some thing for which, it is in such case thought fit to render him responsible: the person regarded as being in some sort in his power, and the thing completely so.

In this case, though it may be that by no

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care on his part could the damage have been prevented, yet after the damage had taken place, he might have made or tendered compensation for it; and in this way it is, that though not criminal, his conduct may, perhaps not unreasonably, have been deemed culpable.

Under English law, the demand in a case of this sort is what is called *an action on the case.*

[Effective Service.] Warning against excess in the quantity or value of the effective service demanded.

1. Whatsoever, in a case of this sort, be the subject-matter of the demand, it will be for the joint care of the pursuer and the judge so to adjust the description given of it, that in case of non-compliance, non-attendance, and non-reparation on the part of the defendant, an *execution-ordering mandate* issued by the judge, may, without other description than what is so agreed upon, suffice to put the pursuer in possession of it. If for want of sufficient information respecting the facts belonging to the case, the pursuer cannot take upon him to fix the amount, let him write in the appropriate space the words, "*not yet ascertainable: remains to be ascertained from the evidence.*"

2. If, although the demand be, in respect of the collative fact, well grounded, the amount of the subject-matter demanded is, in respect of quantity or assigned value, manifestly excessive, the pursuer will be compensationally and punitionally responsible, in consideration of and according to the amount of the excess: the demand being to this amount ungrounded, and the exaction of the service having the effect of oppression and extortion.

3. By appropriate interrogatories, it will be the care of the judge to bring the statement respecting quantity and value to such a degree of correctness as may warrant his giving possession to the demandant, in the event of non-compliance on the part of the defendant, after an appropriate mandate received by him.

4. From the *defendant's* counter-statement, should any ensue, it will appear what is the object of his contestation: whether it is the applicability of the alleged collative fact, or only the quantity or value assigned to the subject-matter of the demand.

[Counter-Evidence, if any.] The pursuer, — does he know of any — can he think of any evidence, the tendency of which may, either in his own opinion, or, as he believes, in that of a defendant, be to weaken the opinion supported by the evidence adduced by himself, as above?

If any such counter-evidence exists, the earlier the mention of it is exacted, the better — the better for the parties on both sides. By the requisition thus made of it, the eyes of the pursuer are thus of necessity turned to the state of the case as it must have presented itself to the other side; and by the comprehensive view thus taken, the ulterior vexation and expense of the suit may be saved to himself, as well as the whole of it to the defendant, after being thus interrogated.

If, knowing of any such counter-evidence, he omits to furnish indication of it, the omission will be circumstantial evidence of *evil consciousness;* and, in addition to other evidence, will of itself constitute sufficient ground for a dismissal of his demand: and it may moreover be punishable in the character of a separate and substantive offence; to wit, falsehood, mendacious or temeracious, as the case may be.

To counter-evidence, apply of course the same distinctions as those which as above have place in the case of evidence.

The facts to which the counter-evidence applies, may as well be those which, with relation to the pursuer's title, bear the relation of ablative facts, as those which bear to it the relation of collative facts. If they are collative facts, the tendency of it will be, either to disprove in a direct way the existence of them, or to cause to be regarded as unreasonable the inference deduced in affirmance of them from the evidence on that side: if ablative facts, the tendency of it will be to prove the existence of those same ablative facts.

[Counter-demand, if any.] Reasons for inquiry under this head, are the same as in case of counter-evidence. Sub-heads for inquiry, the same as in the case of the *demand,* as above.

[Judicial Service.] Under this head will be comprised whatsoever chain of operations may be necessary to be performed by the judge, ere the effective service, or some succedaneum to it can have been rendered to the pursuer. These operations, or *elementary judicial services,* as they may be called, will be the result of the exercise given to the several distinguishable functions brought to view in the Constitutional Code, Chapter XII. Judiciary, Section 9, *Elementary Functions;*— the last link in the chain being constituted by the exercise given to the imperative function, by means of the mandate or mandates by which execution and effect is given to that portion of the law, which the pursuer's demand has in this case for its ground. To bring to view these operations, in all the varieties of which they are susceptible, will be the occupation of the remainder of this same Procedure Code

[Ablative Facts.] In the case of a wrong,— an inculpative fact on the part of the proposed defendant, (thence a collative fact, with relation to the pursuer's right or title to satisfaction at his charge), is an act of the sort

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of those which, by the law in question, are constituted offences, unless accompanied by some one of the circumstances included in a correspondent list of justificative or exemptive circumstances. If any such ablative fact has place, his title to the service in question has no place. If of any such ablative fact the existence be known to him, he is in a state of *evil consciousness* with relation to his demand — consciousness of the invalidity of it, and of the groundlessness of the vexation he is seeking to impose on the defendant; and this state of evil consciousness as to the application he is making, involves in it an act of *insincerity*, for which he may as reasonably and beneficially be punished, as for mendacious evidence in relation to any *external* and *physical* fact. As to this matter, see what is said in relation to counter-evidence.

[Proposed Defendant,] to wit, the person at whose charge the services, effective and judicial, are demanded — who would be the sufferer by their being rendered — and who accordingly, by a corresponding interest, is urged to oppose their being rendered. To the pursuer, this person may be either known or unknown: if unknown, the application cannot as yet be anything but *informative; contentious* it cannot be termed, unless and until, by means of appropriate arrangements taken by the judge for the discovery of the person, a *contestation* with him is commenced. The case in which he is thus as yet unknown, will most commonly be a penal one, that being the sort of case in which, with a degree of force correspondent to the magnitude of the suffering produced by the obligation of rendering satisfaction — or by the punishment liable to be undergone, or by both as the case may be — his interest will be urging him to keep himself from being known. By accident, however, this latentcy may have place in a case where the suit is simply requisitive, as to which, see Demand Paper A; as also, in any case, whether inculpative or not, in which, by the contemplation of the inconvenience attached to the fulfilment of the obligation endeavoured to be imposed upon him, he is prompted to evade it.

NOTE TO DEMAND-PAPER D.

[Evidence.] In a penal case, whether the offence and the species of suit are, as here, *purely public*, or whether they are *publico-private* as in the case of the Demand Paper E, the evidence will commonly have three distinguishable subject-matters; to wit — 1. The matter of fact, or state of things, regarded as productive, or tending to be productive of mischief, and supposed to have been the result of the *act* of some human agent; 2. The nature of that same act; 3. The personality of that same agent.

Of these three distinguishable subject-matters of knowledge and evidence, the first may be known, while the second and third are as yet unknown: of damage produced by conflagration, the existence may, for example, be known, when, as yet, it is not known whether human agency bore any part in the production of it. So again, the damage being known, what may also be known is, that human agency, the act of some person, had part in the production of it, while as yet it is not known *who* that person is.

In Rome-bred law, the state of things regarded as fraught with mischief, with the circumstance of its having had human agency for its cause, constitute together what is called the *corpus delicti* — in French, *corps du délit, the body of the offence;* and are frequently spoken of as composing a subject of evidence and investigation, distinct from the consideration of the personality of the supposed criminal, or culpable agent.

This distinction may also have place, in several modifications of the case, in which, as in Demand Paper B, the suit, whether inculpative or not, is not criminative.

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§ 5. *Pursuer's demand, how amendable.*

As in this stage, so in any subsequent one, the ground of the demand, as stated by the pursuer to the defendant, may at any time be changed, and so *toties quoties*. At this stage it is producible in the case where, at the time of his application, the pursuer adduces and has obtained the examination of an extraneous witness.

If the case be such, that the pursuer in his situation might have foreseen the superiority of aptitude on the part of the second, or say amended ground, in comparison of the original ground, he will be compensationally responsible to the defendant for any disadvantage by the change produced to him in respect of any of the ends of justice: if not, the burthen must rest upon the defendant uncompensated.

Of amendments of this sort, the need has its principal source in the variations which, with or without evil consciousness, or even temerity, may have place, and are continually having place, between any account that may have been given by a witness to a pursuer extrajudically, and the account given by the same witness judicially, while under examination.

Various are the causes by which such variance is capable of having been produced, such as —

1. Difference in respect of the sense of responsibility between the one occasion and the other. On the extrajudicial occasion, responsibility in respect of verity, none; and on the other occasion, the responsibility maximized.

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This cause is the most powerfully operative, and accordingly the most obvious.

2. Difference between the state of the memory on the one occasion, as compared with the other. Here comes in the operation of two antagonizing causes. On the first occasion, the recollection being in its freshest state, is naturally more clear, correct, and vivid. But on the second occasion, the demand for the operation of recollection having intervened, the attention bestowed will naturally have been more intense, and by this means any deficiency, which for want of attention may have had place in the statement made on the first occasion, may have received supply.

Here, by the bye, may be seen how vast the importance of the avoidance of delay may be, and commonly will be, in reference to the direct, as well as to the collateral ends of justice. By every day of unnecessary delay, addition is made to the probability of ill-success to him who is on the right side; to the probability of good success, to him who is on the wrong side.

The points in relation to which the need of such amendment may have place, are the following: —

1. Ground of the demand, in point of law, as per Table of rights and Table of wrongs, and the chapter and section of the code to which the case belongs.

2. Place at which the fact in question happened.

3. Time at which the fact in question happened — at which the state of things in question had place — at which the act in question, positive or negative, was performed.

§ 6. *Commencement of suits — English practice.*

The establishment of eventual forthcomingness and responsibility, on the part of applicants, will be seen to be a business of no small intricacy and difficulty, when provided for, as it must be, on an all-comprehensive scale. It is a business for which, under the current systems, there is no demand, and which, to those whose whole experience and attention have been confined to those systems, will be apt to appear superfluous, and no less trifling than troublesome. The defects of those systems under this head have two causes, varying according to the nature of the case: —

If the suit be a non-penal one, no person is received to state his case in his own person, unless it be with a professional assistant at his elbow: in England, in particular, matters are so ordered, that while, by the instrumentality of a professional assistant, any person may institute a suit of this kind against any person for anything, or for nothing at all, — no person, even if by miracle he could, without that instrumentality, contrive to institute any such suit, could even by any such miracle institute it in the presence of the judge. In England, in particular, the judge keeps open a shop, at which, on payment of a fixed sum, without so much as supposing himself to be in the right, any man may purchase the assistance of the judge, towards ruining any other man; the judge by purposed ignorance, escaping from all responsibility for the misery to which he gives birth, and from which he profits. As the party cannot thus buy his chance for justice, otherwise than by the hand of a professional assistant, the lawyer will not lend his assistance, unless, in his view of the matter, he has sufficient security for the costs, his own pay included; and thus all such trouble as that of inquiring into the circumstances of customers is saved to the judge.

To lawyers of all sorts and sizes, thus is convenience maximized. To non-lawyers the consequence is, that he who has not wherewithal to pay for a ticket in the justice lottery, in the character of plaintiff, goes to a certainty without justice; and in this situation are at least nine-tenths of the whole population; while, in the character of defendant, he who cannot pay the costs of defence, is, in every instance, between plaintiff and lawyers, consigned to complete and certain ruin, without possibility of escape. The judge, having taken care to know nothing about the matter, being thus as completely guiltless of the misery he has produced, as a murderer would be of murder, by shutting his eyes while the bullet was doing its office.

In a penal case, the matter stands on a different footing. Judges themselves could not save themselves from having their houses broken open, if the applicants were not received, as indiscriminately as here proposed, to give information respecting the most highly punishable class of criminal offences. But here, too, the judge of the highest rank makes his escape from responsibility and trouble in every shape: the troublesome part of the business is committed to an underling, who may be occupied about it for days, while a small part of the day is all that is occupied by the great judge, matters having been brought into preparation for that purpose.

Meantime, not small is the degree of convenience provided for the underlings. If the individual accused by the information given, is one whom nobody knows, — the information being upon oath, the oath is sufficient warrant for immediate incarceration, without any such trouble as that of an inquiry into the trustworthiness of the informant.

But now, suppose the individual accused to be one whom everybody knows. In this case, there is no degree of solicitude but what will naturally be employed in the inquiry into the trustworthiness of the informant.

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§ 7. *Judication without audition, Anglicé — its absurdity.*

If, without knowing or hearing a word about the disorder of the patient, the physician were to pour down his throat a dose of physic, or the surgeon lay hold of him and bleed him, they would do exactly what, in cases called civil ones, the legislature and the judge do, in the first instance, by the defendant at the commencement of a suit under English law. What they have never cared about, is how much the party will suffer from what is done: what they have always cared about, and what is all which at any time they have cared about, is the money and the power: the money they thus receive, and the power they thus exercise.

Under the English system, in those judicatories which are called common-law courts, in contradistinction to equity courts, — if the defendant fails as to the contesting the demand in proper form, the plaintiff obtains in his favour what is called a judgment; but a judgment on which, without a further proceeding, under which the evidence belonging to the case is elicited, nothing can be done. This proceeding is performed in virtue of what is called a writ of inquiry: the judge being, not the judge of the judicatory in which the suit was begun, but a subordinate functionary called the sheriff, by whom, had the inquiry been made in the presence and under the direction of the judge, simple execution would have been given to the judgment then pronounced.

This lot of factitious delay, vexation, and expense, has for its cause what may be called the *judicial-ignorance-maximizing principle*, or *thought-saving principle*, — that principle which has for its object the giving to the judge his profit out of the suit, with the least expense possible on his part, in the articles of time, labour, and thought. Of the number of the suits of which in a twelvemonth the judge by his signature pretends to have taken cognizance, only in the case of some small proportion has he, from first to last, known anything at all about the matter; and thus, in the great majority of cases, the money exacted by the judges (for five is the number of those employed in doing nothing or worse than nothing) is so much obtained on false pretences: an offence punished in the case of mean evil doers, and punished by those same judges, with what is called transportation for seven years, — that is to say, banishment and confinement to hard labour for that time.

Go to a common-law judicatory, you thus get decision without thought and without effect. Go to an equity judicatory, you get thought, or at least prate, without decision: prate in plenty, with years of delay between prate and prate. Thus has it been now for more than twenty years past, ever since the country has been afflicted by Lord Eldon.

CHAPTER XIII.

DEFENCE, HOW ELICITED.

§ 1. *Modes or shapes.*

COMPLICATION will be here presenting itself in appalling abundance. The best remedy, imperfect as it cannot but be, — carelessness would join with unscrupulous hostility in denouncing as the cause of the disease.

Parties, each at the same time, pursuer and defendant, one or more in every judicial territory: to each party a swarm of witnesses. Such is not only the conceivable but possible nature of the disease: happily, it is not a frequently exemplified one.

As to the here proposed system, so far from creating additional evil in the shape of misdecision, delay, expense, or vexation, it provides new and manifestly efficacious securities against evil in all these several shapes. These are — to wit 1. The universally-extending responsibility in case of falsehood; 2. The universal exposure to subsidiary oral, after epistolary examination.

To English practice, neither do these, any more than any other class of cases, ever present the smallest difficulty. Be the gordian knots ever so complicated and ever so numerous, in the hand of chicane is a sword, by which difficulty in every shape is cut through without difficulty. Whatsoever statements, demandative or defensive — whatsoever evidence the nature of each case calls for — all are elicited in one or other of the two most deceptious, most untrustworthy modes that human ingenuity could have divined: — affidavit evidence and secretly-elicited responsion to a system of interrogatories framed in the dark; and epistolary responsion, incapable of being followed and purified by oral interrogation; — modes having for their object the sinister emolument of their contrivers, and for their instrument a galaxy of perjuries. When the division of the sweets commences, in the place of creditors, come in the two classes of self-created harpies, the judge in all his forms, and his instrument and dependant the professional lawyer in all his forms. The filth of the harpy finds, in the mixture of mendacity and absurdity poured forth from their lips and from their pens, its not unworthy representative: the money they fly off with — the defiled paper and parchment they leave in lieu of it.

As to parties, witnesses, and their sufferings, the same sort and degree of regard do they find in the breast of the authors, as do those of the negro in that of the planter — those of the Hindoo in that of his English proprietor — those of the Irish Catholic in

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that of the Orangeman — those of the non-religionist and rival religionist in the imagination of the religionist. Sufferings, which a man neither feels nor sees, cannot be too great: as to those which are seen by him, by some they are seen with pain, by others with indifference, by others again with delight.

Where, having nothing to gain by deviation from any of the ends of justice — nothing to gain by misdecision, delay, vexation, and expense, and at the same time everything to suffer from it at the hands of the legal and public-opinion tribunals, with the light of publicity shining in full splendour upon his every word and action, — it were strange indeed if more were not done by the judge towards lessening the evils opposite to the ends of justice, than if motives for the endeavour to lessen them were altogether wanting; — still stranger if more were not done by him than can reasonably be expected to be done by judges whose interest it being (for such their predecessors have made it) to maximize the mass of those same evils, it has of course been a constant object of their endeavour, — the end in view of all their operations.

Thus circumstanced, under the English system, have been the whole hierarchy of the judges of the higher order: subject only to here and there a slight and narrow amendment at the hands of the acknowledged legislature (of which they were all along themselves the oracles,) the system of procedure has always been under their direction, in the double capacity of effective legislators and judges: judges applying the law — that very law which, on pretence of *declaring* it, for this is the cant word, their predecessors and they themselves have all along used, — declaring that to have existence, which even in and by this very declaration, is declared not to have been made by anybody. Not by the legislature: true; and thus much must be allowed, though it is they who say it. But, according to them, neither is it by themselves that it is or has been made; though, if not by themselves, by whom else can it have been made?

In the whole system may be distinguished, for this purpose, three chief modes of procedure: the common-law civil, the common-law penal or criminal, and the equity mode. In no one of them (except for the purpose of lucrative contribution) is any real regard actually paid to the direct ends of justice: in no one of them, in the regulations established, is any regard so much as professed, or pretended to be paid, to the collateral ends of justice.

Bribe-taking, which is out of the question — bribe-taking is never practised, it not being safely practicable: not being imputed to them, how is it, it may be asked, that they are gainers by misdecision? The answer is, — in one vast class of cases, one gain they can make, and at all times have made — by favouring a party which it was their interest to favour — and that is, in causes in which government takes an interest in the side on which government is — that government of which they themselves are such actively efficient and highly interested members.

But as to the practice of misdecision, another interest they have, which, though not so manifest, is much more extensive in its application and operation than that just mentioned. This is, the effect of misdecision in the production of uncertainty. It is on the uncertainty that they depend, in a great measure, for the whole assemblage of their insincere, their *malâ fide* customers, so far as regards the question of law. Were the state of the law known to all, no one, unless on the ground of knowingly false evidence, would venture to institute an illegal claim, or defend himself against a legal one. But having so arranged matters, that he who is rich enough to pay the price is sure of success against all those whose pecuniary means are to a certain degree inferior to his own, the greater the number of chances of success which, by the adjective law of their own creation, they have given to those against whom the substantive branch of the law has expressed itself, or has been thought to express itself, the greater the encouragement for them to engage in a groundless and unjust pursuit, or in a groundless and unjust defence, as the case may be.

This policy of theirs has, as it were, betrayed itself by an expression which could not be prevented from growing into use: this is that in which the ground of decision has been distinguished into two modes; decision according to the merits, and decision not according to the merits. Now as to these two, the expression in cases decided otherwise than upon the merits, may serve for indication of all the cases in which, either for an individual benefit in the shape of corruption, to the individual judge then deciding, or for the aggregate benefit of the profession, — misdecision has been exemplified — injustice knowingly and wilfully committed. Decision otherwise than on the grounds of the merits is, in other words, decision on technical grounds. The decision on technical grounds will, so long as it remains, remain a permanent and inexhaustible spring of safely commissable, and committed injustice: for the technical rule being palpably repugnant to justice, the judge at all times has for choice, the choice between adhering to the unjust rule, and so favouring the one side, or departing from the rule, and so favouring the other.

In the common-law mode, to wit, in the case of jury trial, all the witnesses on both

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sides are brought together at once, at the same hours on the same day, and thus the maximum of dispatch, it may be alleged, is secured. But supposing this to be the case in general, no advantage would be given by it over, and in comparison with, the here proposed mode. Why? Because, in every instance in which the end is really the end conducive to justice, it may, and naturally will, be employed in the here proposed mode; whereas, whenever that at present established mode is not conducive to, but opposite to, the ends of justice, be the opposition ever so strong, it cannot but be employed.

In the established mode, the interval of time between the commencement of the suit and the delivery of the evidence, must be that which is necessary to let in that piece of evidence, the elicitation of which will require the largest portion of time: and during the whole of this largest portion, all those pieces of evidence which might have been elicited in smaller portions of time, must remain unelicited. One consequence is, that the greater the portion of time, and the greater the number of witnesses whose testimony is requisite, the greater is the probability of the deperition of evidence: of a result, by which injustice may be inevitably and irremediably substituted to justiee.

Effects and fruits, the causes of this regulation, many, for Judge and Co.: money obtained on some occasions, some of it on grounds which may be true or false as it happens; on others, by pretences which are constantly and certainly false. On some occasions, on application made, order for enlargement follows of course. In these cases, what is done for relief of the party, is done by Judge and Co. for money obtained by them on false pretences. The act pretended is an application made to the judge: of no such application, individually taken, does the judge ever hear: parties to the fraud, the attorney who instructs the barrister to make a motion — *i. e.* an application to the judge—and the barrister who pretends to have made it. By this fraud, 10s. 6d. is gained by the barrister, somewhat less by the attorney; the barrister writing his name for the money, the attorney having previously written a few words more. By this fraud, which the suitor is made to pay for, he is saved from the burthen, whether of compensation or punishment, which otherwise would be imposed upon him by the judge; the judge, by the fear of that burthen which otherwise would to a certainty be imposed, extorting from the suitor the money thus thrown by him into the hands of these his partners.

In the judicatories which act under the name of equity, this union of fraud and extortion is at the same stage of the suit repeated once or twice, as a matter of course.

In one particular, all these modes agree: for every operation, by whomsoever performed, an allowance of time is fixed by general regulation. By this generality, a negative is thus put upon the very idea of having any regard to the convenience of any one individual on either side. In each individual suit, the chances are as an unlimited number to one, in favour of injustice, to the damage of one side or both: if it is too short, the party who is in the right has not time enough to do that which is necessary to the manifestation of his right; and here comes the injustice which is opposite to the direct ends of justice: if too long, *i. e.* longer than is necessary for the manifestation of his right, here, by the amount of the excess, comes delay — delay to the prejudiee of the collateral ends of justice: and from delay comes vexation, with more or less probability of expense.

When on any special ground, true or false, more delay is desired, money in much greater abundance is extorted. An application to the judge is really made: evidence to support the allegation — a mass of written evidence, is tendered to his cognizance: the evidence is penned, not by the individual—him whose statement it contains — but by an attorney bywhom it is licked into a form deemed suitable to the occasion and the purpose: along with this evidence, goes an account of it—a sort of comment on it, drawn up likewise by the attorney. This comment is called a brief, and is delivered to the advocate. The application thus made may be opposed by a counterapplication from the other side, drawn up in the same manner; and thus, out of the belly of the principal suit, is bred an incidental one.

Even within the bounds of the kingdom of England, not to speak of united kingdoms and distant dependencies, the distance of the abode of the suitor from the judgment-seat, varying from a few feet to little less than three hundred miles, — from this circumstance may be formed a judgment what sort of regard in the establishment of these time-fixation rules, was paid to the convenienee of the people in quality of suitors, and of what sort was the motive which in the establishment of them constituted the final, and thence the efficient cause.

The demands for postponement being throughout the process multiplied partly by nature, partly by ingenious industry, and under the name of vacation, vast intervals of relative inaction having been most impudently established — suits in unlimited abundance are thence to be crowded by regulation, into spaces of time incapable of holding them: suits are thus put off, from year to year, every interval being a gulf in which the for-

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tunes of the least opulent of the contending parties is swallowed up: iniquity being triumphant in the person of the most opulent.

For the sowing of these regulations, the seed of which all the money was the fruit — the originally-looked-for and continually-gathered fruit — it was necessary to prepare the ground. The grand operation by which this preparation was effected, was the regulation by which the parties on both sides are in every possible case kept as far as possible excluded from the presence of the judge.

Suppose the applicant in his presence,—to the extent of his knowledge and belief, any matter which presents a demand for consideration for the purpose of the suit, may be extracted from him at that one hearing; and thus a plan of operations for the conclusion of the suit, with the greatest probability of rectitude of decision, and with the least delay, expense, and vexation, may to the best advantage be formed at this early stage, which by this means will in many instances be made the last stage, and in many more the last but one.

Here would have been the maximum of appropriate knowledge—of the knowledge of those things, the knowledge of which is necessary to justice. Shutting the door against this salutary knowledge, the contrivers of the system, by this one operation, flagitious and daring as it was, endowed themselves with that ignorance — that happy, because thenceforward necessity-begotten, and thence irreproachable ignorance — which presented an excuse and served them as a veil for all the depredation and oppression which was the fruit of it. For the exigencies of individuals no provision was thenceforward made. Why not made? Because the knowledge of them was not possible. And why not possible? Because, by these judges themselves, care so effectual had been taken so to order matters as to prevent it (and that so long as the system founded on in it lasted) from being possible.

§ 2. *Defence, how procurable.*

Generally, the place of defendant's accersition and examination will be the *originating* judicatory.

This, exceptions excepted, will be at applicant pursuer's choice. But restrictions are necessary to prevent overloading.

Reason 1. Certainty of it being the most convenient to

1. Applicant.

2. Not certain its being less so to any one else.

But only in *one* can the suit be *terminated.* Thence, special preponderant inconvenience excepted, the best is the *originative.*

Sole reason for transfer, incidental or definitive, to a *post originative* judicatory, — diminution of delay, expense, and vexation, attendant on the accersitee's *journey* and *demurrage.*

From this the danger of misdecision would not be diminished but increased.

Causes of increase of delay, expense, and vexation in this case: —

1. No day for defendant's next attendance could be appointed by the judge originative: for the first could not know when the second would have relative leisure.

2. No day, till in consequence of a *correspondence* between him and the judge post-originative.

3. No determinate information could be given to the pursuer, as to the time of defendant's statement and testimony in this case.

Nevertheless power to judge originative to make transference, incidental or definitive, to a judge post-originative, for special reason, referring to delay, vexation, and expense.

When the party addressed is not adducted or accersed to the original judicatory, if oral statement or evidence is required (domiciliary or topographical excepted,) it must be at another, say a post-originative judicatory: *pro tanto*, here then will be *transference.*

Hence unavoidable addition to delay, vexation, and expense — especially in case of retromission.

Cause and measure of the increase: distance between the judicatories.

Cause of multiplication: multiplicity of persons accersible, whether defendants, copursuers, or witnesses.

Judge of the originative judicatory cannot make known the earliest time of relative leisure in another, as in his own judicatory, and not at all without previous correspondence.

For obtaining statement and evidence, where the parties are *many:* the most eligible mode, *epistolary* backed by *subsidiary* oral.

The subsidiary may be either — 1. On the original inquiry; or, 2. Reserved for the recapitulary ditto.

The defendant not being at the time in question present in the judicatory, the epistolary is the only mode which, in the first instance, the nature of the case admits of; to wit, by missives sent to the defendant from the judge. Remains for consideration, in which mode the defendant shall, in the first instance, on receipt of such missive, address the judge. If in the oral mode, it will be by attendance at the judicatory.

Where the originating judicatory is the judicatory of all parties on both sides, the mode of subsequent judicial intercourse will be the oral mode.

The epistolary mode is the most conducive to the *collateral* ends of justice in the following cases: —

1. Expatriation; 2. Subsequent judicatory too distant for accersition to the originative.

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When a day is fixed for the defendant's attendance at the judicatory, — required by the mandate in the meantime, if the time admit, will be —

1. A defendant's response paper, promising attendance on the day prescribed, or making excuse as to the day, and offering attendance on another day therein mentioned.

2. A defence paper, in a form correspondent to that of the demand paper.

Evidence self-serving, or self-disserving, or both together, to be delivered in the epistolary mode, will at the same time be called for, or not, as to the judge may seem most conducive to the ends of justice.

Of the matter thereupon received from the defendant, communication will be made by the judge, if time admit, to the pursuer or pursuers, that on the mutual hearing, he or they may be better prepared.

Examples of the matter of the appropriate response at the maximum of simplicity, are—

1. Defendant's acknowledgment or denial of a document purporting to be his, whether in *his* handwriting or not.

2. Ditto of a statement supposed to be orally uttered by him.

3. Ditto of the receipt of a missive.

4. Ditto of a death with circumstances, as per demand paper.

5. Ditto of a birth with circumstances, as per ditto.

§ 3. *Defendant's attendance — its uses.*

Of a defendant's ,personal attendance at the judgment-seat, among the purposes or uses are the following : —

I. Uses to the Pursuer's side :

1. Furnishing appropriate confessorial evidence.

2. Furnishing indicative evidence of ditto.

3. Furnishing information of means of effective responsibility at his charge, satisfactional or punitional, or both, as the nature of the case requires and affords.

4. Furnishing means of co-enduring accessibility on his part for the purpose of the suit.

II. Uses to his the Defendant's side :

1. Furnishing his own appropriate self-serving evidence, if he has any.

2. Furnishing indicative evidence as to expected extraneous appropriate evidence, expected to be in his favour, and obtaining mandates for the elicitation of it; to wit, either contesting the pursuer's *collative* facts, or establishing facts which, with reference to his title, are ablative.

3. Furnishing the opportunity of applying counter-interrogation to the pursuer, in respect of his self-serving evidence.

4. Furnishing an opportunity of eliciting the pursuer's response to his (the defendant's) counter-demands, if any such he has : and his own self-serving evidence in support of them.

5. Furnishing to the defendant an opportunity of eliciting the evidence of the extraneous witnesses attending on his side, if any such there be.

6. So of counter-interrogating the pursuer's extraneous witnesses, if any such there be.

III. Uses to both sides :

1. Furnishing to both the faculty of settling, for ulterior proceeding, the course most convenient to both.

2. Faculty of receiving and profiting by any such advice as, for their mutual benefit and that of the public, the judge may see occasion to give.

3. In particular, receiving from him any such information and advice as may guard them against the propensity and endeavours of professional assistance to add to the unavoidable expense, vexation, and delay, factitious ditto, for the sake of the profit upon the expense.

4. Obtaining relevant testimony, without being dependent for it on the good will of the percipient witnesses, or other persons capable of yielding it.

Note here, how favourable this means of mutual explanation is to the interests and desires of the sincere — how adverse to those of the insincere suitor, on both sides ; thence how adverse to the sinister interest of professional advisers and assistants, by proportionally depriving them of the custom of the persons who would otherwise be insincere litigants.

Hence the cause why, in all systems of procedure, more or less, endeavours so anxious and successful have been employed in keeping the parties from coming into the presence of each other, together with that of the judge.

§ 4. *Consideranda.*

To be considered at this stage as to communication for the judicial purpose, are — Ends to be aimed at, and the nature of the suit.

1. *Persons* to be communicated with.

2. *Purposes* for which they may be respectively to be communicated with.

3. *Communicaters* or *addressers*, — persons *by* whom, for those purposes respectively, communication may require to be made.

4. *Addressees*,—persons *to* whom the several communications may respectively require to be made.

5. *Operations* which on the occasion of the several communications may require to be performed for those several purposes.

6. *Instruments*, or say written *forms*, which for the performance of those several operations, may respectively require to be issued.

7. Correspondent considerations in regard to things moveable and immoveable.

Persons who, for judicial purposes, at this stage may need to be communicated with :—

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1. Pursuer's co-interessee or co-interessees, on his side as proposed co-pursuers.

2. Proposed witness or witnesses on pursuer's side.

3. Proposed defendant or defendants.

Purposes as to proposed co-pursuers:—

1. Delivery of their demand paper.

2. Settling with each other the proposed purport and tenor of those their demands.

3. Settling with one another and the judge what next course shall be taken as to communication with proposed pursuer's witnesses and defendants.

4. Settling who to apply to as proposed witnesses.

5. Settling the most convenient mode of communicating with them for that purpose.

6. Settling whether, as to the defendant, any and what means of preliminary security are necessary.

Note, that of any such co-interessee and proposed co-pursuer, the existence is matter of accident, and in most instances will not have place.

Proposed witness, viz. such only whose capacity of testifying is supposed known to original pursuer or co-pursuers.

Purposes:—

1. Sending to him a witness's attendance mandate; or else,

2. A witness-examination mandate.

3. Receiving from him in either case a witness's compliance announcing response.

4. Or a witness's excuse paper; or,

5. A witness's testificative response; or in case of attendance,

6. Receiving him, and examining him on his attendance.

7. In case of necessity, causing him to be prehended and adduced for the purpose of examination; to wit, by a witness's adduction mandate, delivered or sent to an appropriate functionary — a prehender.

By proposed witness, understand also holder of written or other real evidence, required to be adduced or transmitted.

Proposed defendant — say one.

Purposes:—

1. Sending to him a proposed defendant's compliance, or defence and attendance-requiring mandate.

2. Receiving from him a compliance-announcing response; or,

3. A defence paper, with an attendance-announcing response; or,

4. A defendant's excuse paper.

5. Receiving and examining him on his attendance.

6. In case of his being examined in the epistolary mode — in addition to his defence paper, his defendant's testification paper.

7. In case of necessity, causing him to be prehended and adducted for the purpose of examination by a defendant's adduction mandate, delivered or sent to a prehender, as above.

Whether it be the effect to be produced and the operation to be performed, ultimate execution to be given to the laws, and service demanded thereby rendered — preliminary security to be afforded—counter-security to be afforded — testimony to be elicited; — and for all these several purposes, intercourse with justiciables and judicial functionaries commenced and carried on, — the endeavour of the judge will be to combine with the maximum of efficiency and the maximum of promptitude (or say the minimum of delay,) the minimum of vexation or afflictiveness, including the minimum of vexatious expense.

Cæteris paribus, that mode of operation which is most prompt will be least afflictive. To the pursuer's side it will manifestly be most beneficial. So likewise to the defendant's side, except in so far as by delay in respect of the rendering the service due, he is served at the expense of the pursuer and of the interest of the public in respect of justice.

Middle agency the judge will take care not to employ without necessity. By every middle agent unnecessarily employed, chance of ultimate failure is increased — delay certainly increased — and either vexation to the agent, or expense in satisfaction for it, increased.

In particular, where, to the loss of any person — a defendant for example — property is to be transferred, he will make *graphical* transfer of it with his own hand, without compelling the defendant to be instrumental in the transference or conveyance. Compulsion may be necessary to produce disclosure: it cannot be to effect graphical transfer.

Of the options which the judge will thus have continually to make, he will all along give the reasons. In particular, where of divers courses for efficiency, he holds himself obliged to employ the most afflictive.

Having obtained from the applicant the appropriate grounds,—before the termination of the first hearing, the judge will have determined, as far as may be, and communicated to the applicant the particulars of the ulterior course.

In case of retention, he will in the first case determine whether any and what preliminary measures of security are requisite to be taken, according to the nature of the suit, for securing execution and effect to the law.

At the same time, whether then to commence intercourse with the defendant; or antecedently, whether with any and which of the persons following:—

1. If the applicant be a proxy, the principal or principals.

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2. Whether a proxy or the principal, any and what co-pursuer or co-pursuers.

3. Any extraneous witness or witnesses, for the purpose of eliciting their respective evidences.

With the defendant and defendants (without waiting for responsion from any other persons, or service from them in any other shape as above,) he will, bating special reason to the contrary, commence holding intercourse.

No such intercourse will be commenced, unless from the applicant's statement, made under responsibility, the judge is satisfied that, taking it for correct, he will be justified in the exaction of the *service* demanded, if neither compliance with the demand nor response contesting the justice of it be received, after adequate evidence of the receipt of the mandate to that effect.

On this ground, with or without preliminary measures of security as above, he will address himself to the defendant or defendants, commanding either immediate reddition of the service demanded, or responsion at the judicatory or elsewhere, by means of an appropriate *defence* paper contesting the justice of the demand.

CHAPTER XIV.

SUITS, THEIR SORTS.

§ 1. *Suit, what.*

A SUIT (meaning a suit at law) is a course of action commenced on application made to some judge, requesting his efficient service for the giving execution and effect (contestation notwithstanding) to some determinate portion of law.

By every suit, a person constitutes himself pursuer; another, in case of contestation, defendant: *thence, sides* at the least two, pursuers and defendants in any number.

By every suit, two services are requested, principal and instrumentary: principal by the defendant; instrumentary by the judge, in causing the principal to be rendered.

Active or passive may be the principal, the defendant's service: — active, where for the rendering it, motion on the part of the defendant is necessary; as in paying money, performing manual labour: passive, as in suffering money or goods to be taken out of his possession, or his body to be imprisoned.

Active is always the instrumentary, the judge's service. In it are comprised of course as elementary services, all those necessary to the removal of obstructions to the rendering of the principal service — all such services as well on the part of the judge, as of all persons who, for purposes of this kind, are by law under his command.

§ 2. *Sources of distinction.*

From divers sources of distinction, divers sorts of suits, viz. —

1. Manner in which defendant may be affected: suits non-penal and penal.

3. Multitude of the objects brought to view: suits simple and complex.

3. Duration: suits summary and chronical.

4. Dependence or independence as to another suit: suits original and excretitious.

5. Number of sides complete as above, or incomplete, two or one only: suits ambolateral and unilateral; unilateral, viz. either

1. Without pursuer, or
2. Without defendant.

The judge supplying the place of each.

§ 3. *Non-penal and penal.*

Suit non-penal* has not for its object the producing on defendant's part, suffering other than that inseparable from the obligation of rendering the service demanded; that service not consisting in suffering, for the purpose of punishment. Suit penal has for its object the producing the service rendered by suffering punishment.

Suit, when penal, is either purely public, or publico-private: purely public, where, no wrong being done to one individual more than another, none has need of the service rendered by satisfaction for special wrong: publico-private, where, wrong having been done to an individual, or to a class less than the whole community, service by satisfaction is needed and demanded accordingly. Of the service rendered by suffering punishment, no individual having more need than another, the pursuer, if any, must be a government agent, say *a government advocate.*

In this case, the satisfaction is demanded by the private, the punishment by the public, pursuer.

As to the government advocate, see Constitutional Code, Chapter XII. *Judiciary collectively.*

§ 4. *Simple and complex.*

Suits simple and complex. In the case of complexity, for the standard of comparison, take the most simple conceivable.

Exemplification in the case of a non-penal suit: —

1. Subject-matter, — one; say a horse, claimed by pursuer of defendant.

2. Pursuer, one.

3. Defendant, one.

4. Evidence on pursuer's side, — witness one, the pursuer.

5. On defendant's side, — witness one, the defendant.

* [Non-penal.] *Civil*, why, though customary, not *here* employed? Answer: It is ambiguous, meaning *non-penal*, *non-military*, *non-ecclesiastical*, or *non-canon.*

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In the case of a penal suit —

1. Subject-matter, a horse as above; but now alleged to have been stolen.

2. Pursuer one, say the government advocate.

3. Defendant one, the alleged thief.

4. Evidence on the pursuer's side, — witness one, as before, the pursuer.

5. Evidence on the defendant's side,—witness one, the defendant.

Examples of sources of complexity: —

In a non-penal case —

1. Multitude of pursuers.

2. Multitude of defendants.

3. Multitude of pursuer's evidences.

4. Multitude of defendant's evidences.

5. Complexity of the subject-matter of demand.

6. Multitude of elementary services comprised in the nature of the principal service demanded; as in the case of an account with many items.

7. Multitude of elementary collative facts, necessary to constitute one effective title.

8. Multitude of counter-demands or set-offs on the defendant's side.

In a penal case —

1. Multitude of defendants, *i. e.* alleged co-offenders, in respect of conjugated mode of delinquency; to wit, instigation, effectuation, assistance, subsequential protection.

2. Multitude of offences naturally concatenated on the occasion of the same forbidden design; acts of preparation, attempt, consummation; as in rebellion, sedition, riot, smuggling.

Examples of cases in which persons more than one may stand connected in interest, on one side or the other; in particular, on the pursuer's side: —

I. Husband and wife.

II. Principal and trustee; to wit, in the various characters of

1. Guardian of a non-adult.

2. Guardian of a person insane.

3. Steward for residence or property.

4. Bailiff for property.

5. Commercial agent.

6. Trustee for a mass of property, placed in trust for some particular purpose.

III. Persons respectively claiming, or possessing an official situation, non-ecclesiastical or ecclesiastical, in the characters of locator (patron,) locatee (nominee,) incumbent, or other occupant.

IV. Executor or executors, or administrator or administrators to a party deceased.

V. Partners in a mass of manufacturing or trading stock, or in the exercise of a profit-seeking art or profession.

VI. Members of the same corporate body, suing or sued as such.

VII. Persons jointly interested, as co-occupants or expectants, simultaneously or successively, in a mass of immoveable property co-devisees, remainder men, &c.)

VIII. Persons having an interest in a complex subject-matter.

IX. Possessor of a thing claimed by divers claimants; as in case of interpleader, garnishment, foreign attachment (*Anglicè*,) multiplepoinding, arrestment (*Scoticè*.)

Examples of cases in which persons more than one may stand connected in interest on one side or other, in particular, on the defendant's side; — to wit, in non-penal cases —

1. Proprietors or occupants of lands, on which tithes or fee-farm rents are claimed by the same title.

2. Drawer, drawee, and indorsers of a bill of exchange.

3. Principal and sureties, or say bondsmen.

4. Co-freighters in the case of a loss upon a ship's cargo.

5. Co-underwriters in a case of insurance.

Examples of suits more particularly apt to afford a multitude of witnesses, or sources of real or written evidence: —

Suits relative to

I. Boundaries.

2. Rights of common.

3. Rights of way.

4. Tithes.

5. Legitimacy and filiation.

6. Wills — their authenticity or fairness.

7. Deperition, or deterioration of buildings, or navigable vessels, or their contents, on the occasion of insurance.

8. Corporate rights — (rights possessed or claimed by persons as members of a corporate body.)

Examples of multitudinous masses of evidence, most commonly testimonial, each applicable to any sort of suit: —

1. Alibi evidence.

2. Character evidence. (Facts tending to the depression or exaltation of the character of a party or witness).

3. Facts tending to the proof or disproof of a circumstance operating in diminution or augmentation of the probative force of a person's evidence: such as connexion or disconnexion in the way of pecuniary interest, natural relationship, rivality, or any other cause of amity or enmity, as towards a party to the suit.

4. *Facts* alleged as excuses for *non-forthcomingness* on the part of persons or things.

Examples of cases where multitudes of evidentiary facts may be requisite to prove or disprove a habit, or custom, or condition in life: —*

Case of a habit: — facts probative of

1. Insanity (as for the purposes of subjec-

* *Ex. gr.* of husband, wife, or child, of such a one.

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tion to guardianship, invalidation of contracts, exemption from punishment.)

2. Cruelty (on the part of a master, father, guardian or husband, for the purpose of separation.)

3. Loose intercourse (on the part of the husband or wife, for extenuation in adultery.)

4. Case of a custom, to wit, a habit on the part of a multitude of persons.

5. Customary occupation of land, for the purpose of passage, pasture, or exfodiation, or abstraction of water.

Examples of cases where the subject-matter of demand; that is to say, of the service demanded, is complex: —

I. Case where the whole is demanded.

1. Mass of moveable property, due on a bill of sale.

2. Lands or buildings in the possession of divers occupants.

3. Estate yielding successive masses of income, in one or more of a variety of shapes; such as tithes, fee-farm rents, manorial quit-rents, fines or heriots, tolls, fees of office, &c.

II. Where a share only is demanded.

1. Share in a mass of property vacant by death.

2. Share in a mass of property possessed in common, on the footing of partnership.

3. Share in a mass of property subjected to division on the ground of insolvency or bankruptcy.

4. Share of a mass of property captured in war, generally by sea.

§ 5. *Original and excretitious.*

An *excretitious* suit is a suit which has grown out of a former one, called thence, the *original.*

Sources of excretitious suits: —

1. Obstruction; viz. to the course of justice.

2. Retaliation (judicial;) viz. by counter-demands.

Sources of obstruction: —

1. Original circumstances of parties at commencement.

2. Incidental or adventitious; springing out in the course of the suit.

Original sources: — examples are —

1. Applicant's relative indigence, thence inability of himself to pursue.

2. Applicant's deficiency in respect of natural responsibility. [As to natural responsibility, see Constitutional Code.]

Incidental or adventitious sources of obstruction: —

Examples are —

Non-compliance, viz. with reference to judge's decree, on the part of

1. Parties.

2. Extraneous witnesses.

3. Judicial functionaries.

4. Persons at large, incidentally called upon for judicial services on the occasion of the suit.

Practical use of the mention made of obstructions: —

Rule 1. From obstructions in any number, and need of correspondent excretitious suits in consequence, make not a ground for delaying longer than necessary the termination of the original suit.

Rule 2. Where, for the purpose of the original suit, evidence has been adduced sufficient to warrant conviction of delinquency in respect of an obstruction, proceed to judgment and execution accordingly; making up the record of the excretitious without waiting for the termination of the original suit.

Exemplification of the use of these rules, as applied to testimonial falsehood uttered in the course of the suit: — in one and the same suit, by the same or any other person or persons, testimonial falsehoods may in any number have been uttered, when the grounds for withholding credence have been sufficient for conviction of falsehood, and no further ground or grounds for defence could be obtainable by any separate suit.

In the English system, for want of such rules, falsehoods by thousands remain unpunished, and in a vast proportion give to the criminal the profit sought by his crime: in case of a separate prosecution, the expense, delay, and vexation, being vast and certain; adequate motives wanting; and conviction, judgment, and execution, eminently uncertain.

Practical use of the mention made of judicial retaliation: —

Rule 1. If, from the applicant's examination, it appears that the proposed defendant has a counter-demand against him, impose not the burthen of defence, unless, if applicant's statement be correct, service in some shape is due to him on the balance.

Rule 2. For this purpose, make this a constant part of the applicant's examination.

Rule 3. On the first mutual attendance, take cognizance of all subjects of disagreement, and decide accordingly, doing what can be done towards re-establishing amity of affection, and producing on both sides a sentiment of approbation in relation to the decrees, if any, issued in conclusion.

§ 6. *Plurilateral and unilateral.*

Ordinarily, sides in a suit two — pursuer's and defendant's: in each situation, individuals in any number: suit plurilateral, viz. bilateral.

Necessary to constitute a suit, — situations two; whereof the judge's, one; the other, either defendant's or pursuer's: suit in both cases unilateral.

Case where defendant's side only has place: pursuer's being wanting, judge occupies it. Examples: —

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1. Suit penal, procedure styled *Romanicè, inquisitorial;* in contradistinction to *accusatorial*, the more ordinary mode.

Initiator here, the judge: to the judicial, he adds the pursuer's function. Information he needs none. On suspicion (seat, and perhaps source, confined within his own breast,) he convenes, or causes to be prehended, the object: and by interrogation, extracts evidence, direct or circumstantial, or both; — direct, from responsion; circumstantial, from responsion or silence, and deportment.

If judge acts from information, the more apt course would be, to consign the pursuer's function to the government advocate.

2. Suit non-penal, — audit of accounts. Judge styled auditor. Case in which it is most in use, that where an individual, having received money from or for government, has to prove the aptitude of the use made of it.

Case where pursuer's side only has place: defendant's wanting, judge occupies it.

Example: — Court of claims, *Anglicè:* benefit claimed, privilege of acting a part in a state ceremony — the coronation.

Preferable course, consigning the defendant's function to the government advocate.

Thus, *Anglicè*, on a claim of peerage: so here on claim of a place in the Merit Register, as per Constitutional Code.

In both cases a suit has place: for so have contestation, and judicial decrees thereupon; else, the decision would be avowedly arbitrary, which it is not in either case.

In both, the judge, how unaptly soever, adds to his own function, those of the party or parties on one side: thus are both sides occupied.

Difference between number of sides, and number of conflicting interests. If for every one of a number of antagonizing interests supported in the course of a suit there were a side, the number of sides would be indefinite.

Examples are, — all cases where a mass of property is to be divided among co-claimants; where the subject-matter is complex.

Example of causes of opposition of interests here, are, —

1. Question, who shall be admitted, who not.

2. Of those admitted, what shall be the respective shares.

Here, if the supposition be that there is but one suit, if there be as many sides as interests, there are as many sides as claimants: or the suit may be resolved into as many elementary suits: in each of which there may be one pursuer, and the rest all defendants.

Illustration, on the supposition of four co-claimants. Suits and claimants, suppose four, A, B, C, and D: —

Suit 1. Claimant and pursuer A, the joint contestants and defendants B, C, D.

Suit 2. Claimant B, joint contestants A, C, and D.

Suit 3. Claimant C, joint contestants A, B, D.

Suit 4. Claimant D, joint contestants A, B, C.

Cause of the habit of considering a suit as having but two sides, whatever be the number of antagonizing interests. The design of the suit originating in some one party interested, his endeavours have naturally been, to engage all those to join with him (whose claims he regarded as uncontestable,) were it only that they might share with him in the expense. All who did not join with him were of course made defendants, that by the judge they might be compelled to submit to him the making the division, or say distribution.

Thus come to view identity, and diversity, as to suits.

Every separate demand may be considered as constituting a suit.

This admitted, in every course of action ordinarily considered as constituting the suit, may be distinguished as many elementary suits as there have been made demands in the course of it.

Examples: —

1. All excretitious suits that have grown out of the original.

2. All counter-demands made on the defendant's side.

3. The demand, in consequence of which a quasi-jury inquiry is instituted.

4. The demand, in compliance with which appeal is allowed.

5. Any demand by which, after being instituted in one judicatory, a suit is for any purpose brought before another; for example, for effecting forthcomingness of evidence or execution.

6. Each such suit may be considered as resolved into as many suits as there are pursuers in it.

7. So, as to defendants.

8. The identity of a suit may be considered as destroyed either by the accession or the secession of a party on either side.

Use of the divisions of suits into plurilateral and unilateral, that the apparently unilateral being seen to be suits proper for the cognizance of a judge, the judge in these cases may be subjected to the same *checks* as in other cases.

Use of the exposition in regard to identity and diversity — that upon no assumption in regard to identity or diversity, any pretence be built for an arrrangement not conducive to the ends of justice.

In particular, for causing operations or instruments to be repeated, under the notion of the extinction of the suit — for example, by death of a party. Examples are various

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in English procedure: occasions and pretences various — ends and motives the same.

Particular use in regard to succeeding stages of inquiry, recapitulatory and appellate: —

1. In the recapitulatory inquiry, all the excretitious suits that can have influenced the decision in the original suit, should be brought to view — none that have not.

2. So, on the appellate inquiry.

But as by the manifold-writing system, the record containing the whole proceedings will be brought to view in both stages, without fresh expense, the distinction will apply not to exhibition, but to observation — to the notice that may come to be taken in the course of argumentation.

Question — Inquisitorial procedure, why not here admitted?

Answer — Reasons: —

1. With a view to appropriate *intellectual* and *active* aptitude: it is of use, that as the undivided attention of one person is employed on the one side, so should that of another person on the other side: the judge's attention being equally applied to each, for the purpose of decreeing in favour of that side which has presented the strongest arguments.

2. With a view to appropriate *moral* aptitude: that in these extraordinary cases the judge may be acting under the same checks, as in all ordinary ones.

§ 7. *Services graduable or non-graduable.*

The service demanded by the demand-paper may be either graduable or ungraduable. Understand by a graduable service, a service which admits of degrees: as, for instance, a service which consists in the demand of a sum of money, in compensation for a wrong suffered in a shape other than pecuniary. Whatsoever be the number of sums of money of the lowest denomination, capable of being taken for the subject-matter of payment on the score of compensation, that same is the number of degrees of which the amount of the compensation is susceptible.

Understand by a non-graduable service, a service, in respect of which no alternative has place, but that of complete performance and complete non-performance: as, for instance, the restitution or transference of a thing not susceptible of division, without destruction or deterioration of value, as a horse, or a house. The service consisting in the payment of a sum certain, in pursuance of a contract: for instance, a bill of exchange drawn on the defendant, and by him *accepted*.*

When the service demanded by the demand-papers, at the charge of a defendant, is graduable, the pursuer will individualize the degree which is the subject-matter of his demand; that is to say, in case of compensation-money for a wrong the precise sum which he consents to accept.

After examining him as to the grounds or reasons on which the fixation thus made of the sum is grounded, the judge will either attach his provisional assent to that fixation, or make such other fixation as to him shall seem meet; which done, the sum so provisionally fixed upon will be the sum stated in his compliance or defence-requiring mandate, as the sum which will be exacted of the defendant, in case of non-compliance, coupled with non-response.

Generally speaking, if the judge sees reason for substituting a fixation of his own to the fixation made by the pursuer, the sum fixed upon by the judge will be less than the sum fixed upon by the pursuer; and in the ordinary state of things, such lesser sum will, by reason of the self-preference inherent in human nature, be the sum fixed upon by the judge. But what may happen is, that in addition to the grounds for increase which have presented themselves to the views of the party, others may have presented themselves to the more experienced eye of the judge; in so far as this is the case, he will present them to the view of the pursuer, giving him at the same time the liberty of substituting the increased sum thence resulting, to the sum originally fixed upon as the sum demanded.

§ 8. *Suits expeditable and continuous: continuous, essentially continuous, and accidentally continuous.*

By expeditable, understand capable of being terminated, so far as depends upon the issuing of the ultimate decree, and consequent imperative execution-ordering mandate, terminated on the day next to that of the admission of an applicant, in the character of pursuer, or say *demandant*.

All factitious delay being injustice while it lasts, all suits are, under the greatest happiness-principle *presumed* to be expeditable in the above sense; that is to say, that in every instance for the justification of the correspondent delay — of the delay occasioned by their being not expedited, some special reason will require to be given.

By a continuous suit, understand every suit which is *not* as above expeditable, and expedited; or say *non-expeditable* suit.

A suit to which it happens to have been a non-expedited suit, has been rendered so either by its own nature, or by accidental circumstances, with which a suit of any sort naturally expeditable, is not so liable to be attended.

* The expression is ambiguous: preferable appellation, *sanctioned* or *confirmed*. Acceptance presents, in the character of acceptor, not the individual *drawn upon*, but the individual by whom the promise is accepted as an equivalent for performance, by payment.

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Every suit which is complex is, according to the degree of its complexity, capable of being continuous in its own nature. For the modes of complexity, see *Scotch Reform*, Delay and Complication Tables, Vol. V.

When, for the purpose of the suit, money or money's worth requires to be either collected or distributed, or both collected and distributed — collected from various persons — distributed among various persons, — such suit cannot fail to be in a greater or less degree continuous.

Every such collection and distribution suit supposes *a trust*, created for the purpose: a person constituted a trustee for the purpose of transferring the subject-matter of the suit to an intended benefitee, or aggregate of intended benefitees.

The original trustee will in this, as in all cases, be the legislature: but for the purpose of the fulfilment of the trust, giving effect to the benefit intended by the creation of the trust, the legislature may either locate, or endeavour to locate the trustee, by its own immediate and single authority, or by the intervention of some person or persons appointed by it for the purpose. This person or persons are either a person or persons at large, or the judge: when it is the judge, application must of necessity be made to him for that purpose. Call it a trust-demanding, or trusteeship-demanding application.

Of trusts created, and accordingly trustees located, or say constituted, examples are the following: —

1. In contemplation of insolvency, a person in whose apprehension the amount of his assets (including money in hand, and credits or any debts due to him) fails of being equal to the amount of his debts — that is to say, the money due from him — locates the aggregate of his assets in the hands of a trustee or trustees, to the intent, that after, or during the reduction of the whole to the shape of an aggregate sum of money, distribution of such aggregate sum of money may be made among his creditors, each receiving the same proportion of the debt due to him.

Here may be seen in this case — 1. Trustor, the apprehended insolvent; 2. Trustee or trustees, the person into whose possession the money in hand, and the power of collecting the money not in hand, is transferred; 3. Intended benefitees, the creditors. Use of this disposition, putting it out of the power of the apprehended insolvent to transfer to any creditor more or less than that which is regarded as his proportionate and due share as above.

2. Of the proprietor of a mixed stock of property, the decease takes place: to some person or persons, one or more, the greatest happiness-principle manifestly requires that transfer shall be made of it. If (in virtue of an appropriate disposition of the law) by the deceased himself, appointment of this or these post-obituary successor or successors has been made in a will, he or they are in that case, in the language of English law, termed *executor or executors*. In default of such appointment of an executor, the law has, by enactments of its own, appointed the trustee or trustees for this purpose: say in that same language, an *administrator* or *administrators*.

But should the law be so worded, or the parties in question so circumstanced, that persons more than one, to the exclusion of others, demand to be received as administrator or administrators, or no person is willing to act in that capacity, and for that purpose to take upon himself the burthen of the trust, — in that case it will rest with the judge to make the appointment; and the question, who shall be the trustee or trustees so appointed, will be the subject-matter of the suit.

Note, that in case no person should be desirous, and thence no person applying, the nature of the case requires that on some person or persons, the obligation of taking upon himself, and giving execution to the power in question, must be imposed; for what is continually happening is, that among the persons by whom the vacant mass of property may come to be shared, are those who are neither fit nor able to give execution to such powers of themselves.

§ 9. *Distributive-seeking suits.*

Suits at large, and *distributive*-demanding, or say, distributive-*seeking suits:* into these two sections may the aggregate, composed of non-inculpative suits, be divided.

By a distributive-seeking suit, understand a suit, in and by which the benefit sought to be obtained is an aliquot part of a mass of property of whatsoever kind; that is to say, whether it be a portion of the subject-matter or subject-matters themselves, or say the *effects*, as in common usage; or a portion of the value of them as determined by sale.

In every such case, for the giving effect to the suit, two decrees will be requisite: one by which commencement is given to the aggregate operation of distribution: the other, by which termination is given to the aggregate operation demanded; that is to say, the distribution of the effects.

Exceptions excepted, of the aggregate which is the subject-matter of the distribution, the composition may be infinitely diversified. For the different modifications, of which the subject-matter of property, that is to say, of proprietary rights and powers is susceptible, see Non-penal Code, Proprietary Rights, their modifications.

Occurrences by which, on the part of the

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proprietor, the need of demand for distribution is, or is capable of being produced, are the following: —

1. Death of the proprietor.
2. Insanity—relative insanity—on the part of the proprietor.
3. Latentcy of the proprietor.
4. Insolvency at large, on the part of the proprietor.
5. Insolvency on the part of the proprietor in the case in which it is termed bankruptcy.

In the case of the death of the proprietor, the title of the demand for the distribution may have either of two efficient causes: —

1. Testamentary disposition made by the deceased, with the concurrence of the legislature.
2. Disposition made by the legislature, in so far as such disposition has failed of having been made by the deceased.

In each of these several cases, two distinguishable services, the one succeeding the other, are demanded at the hands of the judge: the one the initiative, the other the consummative.

Of the initiative service, performance is made by conferring on some person or persons, in so far as is requisite for the purpose, right and powers the same as were possessed by the proprietor in question at the moment of the happening of the occurrence. The purpose of this transfer being the conferring of the benefit in question on some person or persons other than him or them into whose possession the subject-matter in question is to be made to pass, — the consequence is, that such person or persons are, in respect of the obligation conferred on him or them, a trustee or trustees. A trust is created, in respect of which the legislature is trustor or trust founder: such new possessor or possessors, trustee or trustees: all persons by whom it is intended that aliquot parts of the aggregate subject-matter of distribution shall be received, are intended benefitees.

This case is of the number of those in which the interessees, other than parties, are capable of having place, and on either side, or on both sides of the suit.

This species of suit is of the number of those which may be styled complex: sources of complexity essential to the case are the following: —

1. The subject-matter of the property in question, and thence of the suit.
2. Interessees.
3. Parties admitted on the pursuer's side.
4. Parties admitted on the defendant's side.

§ 10. *Several Suits against the same person, how combinable.*

Whatsoever be the number of demands which a pursuer has against a defendant, if there be but one pursuer and one defendant, they may be carried on together; and so they ought to be, if either in respect of the direct, or in respect of the collateral ends of justice, any preponderate advantage be by such conjunction gained.

In the hitherto current practice, such conjunction has everywhere had place in sundry cases; to wit, in every instance in which demands in any number are customarily included under one and the same name.

Such complexity may have place on one side only, or on both sides: on the part of the pursuer only, or on the part of the pursuer and that of the defendant likewise.

Advantages from this conjunction, when it takes place on the pursuer's side alone, are as follows.

I. Advantage to the pursuer: —

He may obtain at once the security sufficient for the eventual obtainment of satisfaction in respect of all of them: whereas, if admitted to adduce them no otherwise than successively, the result might be, that after obtaining adequate security in respect of the first, security in respect of all the rest might vanish and be lost.

II. Advantage to the defendant: —

1. By his learning and viewing at once the whole extent of his responsibility, his mind might, in so far, to wit, as against all demands from that individual, be comparatively at ease: he would see in its whole extent, the burthen capable of being imposed on him — the burthen, for his exoneration from which he would have to provide.

2. In case of cross demands, the defendant would have no more to do than to pay or perform the difference, instead of paying or performing the whole in the first instance: with respect to which he might perhaps be unable; and if able, subject to the accident of not being able to obtain the effect of his demand against the pursuer.

III. Advantage mutual to both parties: —

The same attendance, thence the same journey from home to the judicatory, might serve; and would serve for any number of demands and cross demands.

IV. Advantage to third persons: —

In the same manner as in the attendance of the parties, a single attendance on the part of witnesses, might serve, instead of two or more attendances. So in the situation of missionary judicial functionary, a single act of accersition or prehension, personal or real, instead of two or more.

But be the number of distinguishable demands thus conjoinable with advantage ever so small, or ever so great, they should not the less be kept distinct, and characterized each by its generic and specific name, with indication added of the evidences from which they respectively receive their support.

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Advantages from the distinctness of description are as follows: —

1. On the part of all persons concerned—to wit, parties, assistants, judge, and registrar — clearness in the conception entertained of the several demands, with their grounds in respect of law and fact, would thus be maximized.

2. In regard to probation, whatsoever order turned out, upon inquiry, to be best adapted to the ends of justice, direct and collateral, might, and naturally would be, given to the several masses of evidence, and in case of need, to the several masses of argumentation.

3. In divers cases, the grounds of demand in point of law capable of applying to the same fact, are so nearly contiguous as to be difficultly distinguishable, especially by a pursuer, antecedently to judical examination. For these cases, provision has been made in Ch. XII. § 5, *Pursuer's Initiatory Application Demand how amendable:* according to the evidence, for placing the demand, and consequent execution, upon a different footing from that originally alleged.

By the here proposed unlimited conjunction of demands, facility may, on various occasions, be given to such *law-allegation-amendments.*

§ 11. *Common-law and equity suits, — imaginary, their distinction.*

To every one who will suffer himself to think, and who in thinking will consider the system of procedure as a means to an end, and that end the giving execution and effect to the substantive branch of the law to which it is an appendage, it will be sufficiently evident that the distinction between common law and equity is purely arbitrary and imaginary. Common-law procedure, in so far as it is anything better than a system of depredation and oppression, has for its several ends the giving execution and effect to the substantive branch of the law: of equity, if it be anything better than a system of depredation and oppression, the same may be said. Common-law procedure has for its subordinate object the elicitation of the facts which, if proved, the pursuer relies on, as constituting his right or title to the service demanded by him at the hands of the judge, as promised to him by the article of law, which the demand takes for its ground.

Equally true is this, when predicated of equity instead of common law.

This distinction, then, has nothing in it that is natural, nothing that belongs in common to man at large, or so much as to civilized men anywhere: what it is the result of, is altogether peculiar to British soil, and British practice. Originally it was a conflict, latterly a compromise, between two contending powers—the one called spiritual, in contradistinction to the other called temporal — the former having for its sanction that which bears the name of the religious.

So much for the origin. As to the effect, the broad line of distinction is that between what is transient and what is continuous; a distinction in the political nosology, analogous to that between acute and chronical in the natural nosology.

In a case of which the common-law judicatories take cognizance, there is but one demand either altogether simple, or in but a comparatively slight degree complex; in a case where the judicatories called equity courts take cognizance, the subject-matter of demand is to an indefinite degree complex: the common-law mode of procedure did not in its origin comprise, and does not at this time comprise power adequate to the affrding satisfaction to the demand.

A case of account may serve for example.

§ 12. *Account suits*

By an account suit, understand any suit on the occasion and in the course of which cognizance is taken of demands more than one, on both sides or on either side, originating respectively from efficient causes of right or titles, more than one.

Whatever be the cause or causes of it, it is desirable that to all suffering on both sides, or on either side, from whatsoever cause originating, a termination should be put as soon as possible. *Interest reipublicæ* (says the Roman maxim) *ut sit finis litum:* still more strongly and manifestly is it the interest of the individuals concerned.

Accordingly, on what occasion soever a party on each side is come into the presence of the judge, before their departure he will take the requisite course for ascertaining whether between them any, and if any, what causes of disagreement have place: any cause or causes of complaint on either side at the charge of the other: complaint of any such wrong, for which it is in the power of the judicial authority to apply a remedy.

§ 13. *Suits summary and chronical.*

By a summary suit, understand a suit dispatched at the end of the smallest length of time: by a chronical suit, a suit dispatched at the end of any greater length of time.

Considered as descriptive of the sort of suit, the only difference between a summary and a chronical suit is — that whereas a summary suit may be dispatched at the end of the smallest length, a chronical suit cannot be dispatched till at the end of a greater length of time.

A suit of any sort may last for any the greatest length of time; the absence of a necessary witness, or piece of real or written evidence, suffices to produce this effect.

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Generally speaking, a suit will be likely to be the more lengthy the more complex it is. But some modes of complexity may be apt to produce greater lengthiness than others.

The case in which the length of the suit is at its minimum, is when on the initiatory application it is dismissed.

Of a suit which is not terminated by dismissal at the end of the initiatory application, the least duration is that which commences with the commencement of the initiatory application, and terminates with the termination of the first mutual meeting.

Where the pursuer is permitted, and the defendant required to attend in person, by far the greatest number of suits are actually thus summary.

Such, then, ought to be considered as the standard duration: in such sort, that for any greater duration some special cause should be looked for, and required to be assigned.

When the parties are both or either of them in the judge's chamber, in presence of each other, of the judge and of the auditors, every such case is provisionally presumed to be a summary case: if adjournment be made of it to another ordinary sitting, or an appointed sitting, it must be because at such first sitting the evidence is not in such a state, that upon the ground of it an apt decision can be pronounced.

§ 14. *Quasi suits, or say incompletely organized suits.*

Of the actors capable of being employed with advantage in the judicial drama, a list has been given in the Constitutional Code.

Without the idea of those characters at the least, the idea of a judicial drama, in any of its ordinary forms, cannot be so much as conceived. These are, —

1. A person by whom the demand is made: call him a pursuer.

2. A person at whose charge the demand is made: call him a proposed defendant.*

3. The person to whom the demand is addressed, and at whose hands the service necessary for the accomplishment of it is demanded: call him the judge.

The idea of a completely composed, or constituted suit, being thus established, a description is now capable of being given of two species of incompletely constituted suits: —

I. Incompletely constituted suit the first:—

Parties, — judge and proposed defendant. Wanting, or as grammarians say, *caret*, a distinct pursuer. In the person of the judge, the functions of judge and pursuer are united.

Exemplifications of this sort of things are—

1. In English practice — on the adjustment of accounts in non-penal cases — an audit court. Defendant the accountant. Here no demand is made, but the accountant being confessedly a debtor, he is called upon to exhibit evidence, the effect of which, if credited, will be in each instance to exonerate him from the obligation of paying the money in question in the character of a debtor.

2. In German practice, in a certain class of penal cases, there is an entire branch of procedure distinguished by the appellation of inquisitional or inquisitorial: defendant, or proposed defendant, in this case the *inquisitor:* such is the appellation by which he is distinguished. In the opposite case, *accusatorial* is the name given to the mode of procedure.

3. In Spain, this species of judicatory, if at all employed, has been seldom heard of, but as applied to that branch of penal suits which applies to offences affecting religion.

II. Incompletely constituted suit the second: Parties, 1. A pursuer; 2. The judge; *caret* the defendant. By the judge, in conjunction with his own, this part is also acted.

Exemplification is, —

In English practice, the species of judicature called a *court of claims*.

CHAPTER XV.

SUITS, CONTINUANCE OF.

THE original applicant having been admitted, and this same applicant, or (in the case where he is but an informant) another individual, or (in conjunction with him, or in his stead) the government advocate, being admitted pursuer; and the pursuers, if more than one, and the defendants, if more than one, ascertained and noted down as such: the portion of law of which the legal part of the assumed cause of right is constituted being also ascertained, to wit, by the demand-paper, in which the pursuers (if more than one) will have joined: all the remaining operations (the incidental excepted) which are capable of having place during the continuance of the suit, (or say, all the operations that are capable of having place between those performed at the commencement as above, and the issuing of the decree by which execution or dismissal has place) — are composed of probation, with or without counter-probation, exhibition of appropriate evidence on the pursuer's side, with or without exhibition of appropriate evidence on the defendant's side

Of the diversification which the matter of which the proof is capable of being composed

* By giving to a person, at whose charge a demand is made, the appellation of defendant, much confusion is produced: much confusion, and moreover, much oppression and injustice. Can it be otherwise, when a person, who is utterly unable to defend himself, is spoken of, and accordingly dealt with, as if he were actually defending himself?

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— or say, of the matter of proof or probative matter — is susceptible, exhibition has been made under the head of Evidence. Susceptible of the same diversification is the genus of persons distinguished by the appellation of evidence-holders: one sort of evidence-holder being of the sort at whose command is evidence of the sort in question: the evidence-holder of another sort, he at whose command is evidence of another of those same sorts.

Things being in this state, what shall be the order of proceedings? Answer: That which is prescribed by the delay-minimizing principle and the corresponding rules. Elicit every article of evidence as soon as may be. Exceptions excepted, inability within the time in question to obtain one piece of evidence, affords no reason for omitting, for any length of time, to obtain any other piece of evidence, much less for omitting the second piece of evidence, till the expiration of the whole length of time which must elapse before the first piece of evidence can have been obtained.

Exceptions will be the following, on the supposition that the matter of fact has in each case respectively been rendered preponderately probable: —

1. Result of the acceleration, misdecision.
2. Result of the acceleration, to a preponderant amount, addition to the expense.

Neither of these cases presents itself as of a nature to be frequently, if at all, exemplified.

A case in which the production of misdecision might be probabilized, is that where, if an antecedently exhibited piece of evidence were made known to the person at whose hands a subsequent piece of evidence is required, it might have produced the effect of sinister, that is to say, mendacity-assisting information, or say instruction. But from the observation of this danger, the practical conclusion and correspondent rule is — when the evidence in question has been elicited, keep it during the requisite length of time undivulged; not abstain from eliciting it.

But for whatever reason, in regard to evidence, exceptions excepted as above, it is right that in no instance, of any piece of evidence, should the elicitation be purposely delayed, so is it, and for the same reason, that no factitious delay should be interposed between the ascertainment of the person or persons, if any, who are concerned in point of interest to be admitted as co-pursuers: or the person or persons who, on the account of the pursuer or pursuers, or on their own account respectively, are concerned in point of interest, in being constituted co-defendants.

Before an applicant, whether proposed pursuer or informant, is dismissed from the justice-chamber, — in relation to every person, if any, of whom by such applicant, indication has been given of his being likely to be able to afford evidence likely to be relevant and material to the subject-matter of the application, in such sort as to be fit to enter into the grounds of the judge's decrees, opinative and imperative, in consequence of, and correspondent to, such application; — it will be for the care of the judge, by means of an appropriate mandate, to elicit from such applicant, indication in so far as he is able to afford it, respecting the trustworthiness of such evidence as may be obtainable from that source, and the means of obtainment in relation to such evidence.

Name of the mandate issued for this purpose, a supposed and proposed evidence-holder's description-requiring mandate.

Heads, under every one of which, matter of the indication, or say information, sought for by such mandate, will require to be inserted, or ignorance declared, are the following: —

1. Name: surname and Christian name, or the equivalent, included.
2. Condition in respect of occupation.
3. Condition in respect of marriage.
4. Condition in respect of abode.
5. Matter of fact, in relation to which he is expected to be able to furnish evidence.
6. Nature of the evidence which he is expected to be able to furnish.
7. Condition in respect of sex.
8. Condition in respect of age.

In relation to these several topics, by himself, or with the assistance of the registrar, the judge will elicit the appropriate information by *vivâ voce* interrogation; the registrar making minutation and recordation accordingly, until the matter of the mandate has been completed; and in relation to such matter, the applicant will be required, by his signature, in relation to such heads separately, or in relation to the whole collectively, to make known his assent or dissent. In case of his dissent to the matter of the entry made in relation to such head, the process of elicitation will be continued till some proposition be elicited from him, to which his signature, in token of assent, has been attached.

In so far as ascertained, according to the relation they respectively bear to the suit, and their respective local situation, issue to them, or for them, the mandates following: —

I. To an expected pursuer or co-pursuer — Pursuership or co-pursuership acceptance, or refusal-requiring, mandate.

In this case, in conjunction with the mandate, the registrar will transmit an exemplar of the original pursuer's demand-paper, with directions, or say instructions, indicative of the mode of expressing such acceptance or refusal, as the case may be: together with order for the retransmission of it when filled up, and

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the means of securing communication with him thenceforward: and information as to the consequences in each case, with reference to his interest.

Appropriate formulary:

Addressee, the party him or herself, as contradistinguishable from a guardian.

1. Name of the suit.

2. Pursuer's personal description.

3. This is to require you either to consent to the becoming, from the day of your receiving this, co-pursuer with (naming him or them,) or to decline the being so.

4. If on or before the [ ] day of the month of [ ] next ensuing, this same paper marked A, with your acceptance thereon signified, be not received at this office, you will, accidents excepted, be deemed to have declined to take upon you the character of co-pursuer in the suit. In the benefits attached to it, you will have no part. In the burthen liable to be attached to it, you will have no part.

5. In case of acceptance, you will retransmit to this office, after filling it up according to the instructions therein given, the communication-securing paper marked B.

II. To a proposed defendant or co-defendant —

Compliance or defence-requiring mandate.

Of the mandate thus denominated, the matter will be different, according as the suit is of the non-inculpative or the inculpative class.

In this case also an exemplar of the original pursuer's demand-paper will be transmitted, with appropriate directions, or say instructions, and information as to the consequence to him in point of appropriate interest.

Also with directions as to the mode of compliance-rendering, compliance-promising, or compliance-refusing, with grounds of, or any reason for, non-compliance or compliance-refusing, and communication-securing information.

III. To a supposed evidence-holder —

Evidence exhibition-requiring mandate.

As to place and judicatory, this will be — either,

1. A hither-calling, or say accersitive evidence-exhibition-requiring mandate; or,

2. A thither-sending, or say missive evidence-exhibition-requiring mandate; or,

3. A responsive evidence-requiring mandate, coupled with a paper of interrogatories, or any interrogatory paper annexed.

Of this interrogatory paper, the object is to elicit evidence (self-disserving evidence included) from the supposed evidence-holder, whether a party or non-party.

CHAPTER XVI.

SUITS — TERMINATION.

WHEN the suit is other than a distribution-demanding one, the times for the termination of every suit are two: —

1. When all the evidence which on both sides the nature of the individual case in question appears to have furnished, has been elicited; understand, in a form fitted for ultimate use.

2. When of this or that piece of relevant evidence, the existence of which is more or less probable, the obtainment is, in the opinion of the judge, physically or prudentially impracticable.

In the first case, the definitive decree will be absolute.

It will be so in the case of every one of the four species of suits following: —

1. Noninculpative.
2. Inculpative, but not criminative.
3. Criminative, and purely public.
4. Criminative, and publico-private.

Correspondent to the nature of the remedies to be granted, — and thence to the nature of the remedy, the application of which is the subject-matter of the ultimate service demanded by the suit,—will be the operations, the performance of which will be the subject-matter of the mandate by which the decree is expressed. As to these, see Penal Code, Part II. *Remedies collectively.*

In the other case it may, as in the opinion of the judge may seem most meet, be either absolute or conditional.

If absolute, and in favour of the pursuer's side, it will by the imperative part of it, order execution and effect to be given to the correspondent portion of the substantive law.

If absolute, and in favour of the defendant's side, it will, by the imperative branch of it, pronounce dismissal; dismissal, to wit, of the pursuer and his suit, inhibiting him from making any ulterior application to that same judicatory in respect of it.

In this case, provision is made for securing judicatories, and suitors in the character of proposed defendants, from vexation by unduly reiterated pursuit.

The decree being conditional, it may be so in either of two modes: —

1. In favour of the pursuer's side, but reversible simply, or modifiable, in the event of the exhibition of this or that piece of evidence by which the pursuer's right would be established, or the non-exhibition of this or that piece of evidence by which the existence of the alleged right of the pursuer would be disproved.

2. In favour of the defendant's side, but simply reversible, or modifiable, in the event of the exhibition of this or that piece of evi-

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dence by which the pursuer's title would be established, or the non-exhibition of this or that piece of evidence by which the existence of the alleged right of the pursuer would be disproved.

In both cases it will rest with the judge to determine, which of any collateral security shall be afforded by the party in favour of whom the conditional and defeasible decree is pronounced: in the event of the condition not being fulfilled, or being disfulfilled, as the case may be.

On this occasion, he will elicit in the way of evidence, and hear in the way of argumentation, what the party demanding such collateral security has to allege in support of such his demand; and what, if anything, the party opposing this demand has to allege in opposition to it.

If the suit be a distribution-demanding one, two decrees, to wit, an initiative and a consummative, have place.

By the initiative decree, the cause of inquiry, or say of examination, preparatory to the distribution, is determined to be entered upon.

By the consummative decree, the inquiry is declared to be terminated; and by the appropriative mandate, the distribution determined upon, as the result of the inquiry stands expressed.

Whenever a suit receives its termination, it is by a pair of decrees, the opinative and the recordative; with or without a third, the compensative: with reference to the two principal decrees, it is adjectitious or supplementary.

The opinative decree is either simple or mixed: simple, when in favour either solely of the pursuer's, or solely of the defendant's side, there being but one party on each side: mixed, if partly in favour of one side, partly in favour of the other; so likewise if there be any distinction made as between party and party on either or both sides.

When, either on the ground of law, or on the ground of fact, the pursuer fails to prove the justice of his demand to the effective service, which at the charge of the defendant he demands at the hands of the judge, through the means of his judicial service, the tenor of the opinative decree is — failure in the question of fact; failure in the question of law; or failure in the question of fact, and failure in the question of law.

Of the correspondent decree — the tenor in this case is, pursuer, your pursuit is dismissed — let it cease.

Tenor of the compensative decree: Pay to the defendant compensation-money [so much]: (if there be expense or vexation to any person in the character of defendant.) For delay of justice by useless occupation of judge's time, pay to the helpless litigants fund [so much.]

Although, by the present supposition, the suit may and does receive, and is accordingly supposed to have received its termination in the course of the same hearing as that in which it was commenced; — in which case, what is done on the defendant's side will have to be entered on the record, as well as what is done on the pursuer's side; — yet on this occasion, for greater distinctness, it may be advisable not to exhibit anything of what will have been required to be done on the defendant's side: reserving that for the case which will manifestly be by much the more ordinary case, namely, that in which nothing is done on the defendant's side, until, in consequence of an appropriate mandate issued by the judge, he has paid his attendance at the judicatory before the judge: the pursuer, exceptions excepted, being present at the time.

Here then will follow the demand-paper, containing the entries that will require to be made on the part of the pursuer, he being the person, and only person, whose discourse it is considered as containing. Any portion of discourse, which in consequence of it may have to be made on the defendant's side, as and for the discourse of a defendant, or a number of co-defendants, will be exhibited at the same time at which, in consequence of an appropriate mandate from the judge, the defendant or defendants in the more accustomed manner, at a subsequent stage of the suit, make their appearance on the scene.

Tenor of the terminative decree in this case: —

I. Opinative decree. The pursuer's demand is well grounded — 1. On the question of law; 2. So on the question of fact.

II. Mandative decree. Of this the tenor will vary according to the species of the case, and thence of the suit.

1. No wrong or quasi-wrong imputed to any defendant. Suit purely requisitive not inculpative; partition requisition.

Appropriate mandate: — Partition shall be begun, and under my direction made.

Pursuers one or more: defendants one or more: extraneous witnesses, none. Parties fully bound on both sides; judicial service demanded by the pursuer, granted. Opinative decree, pursuer's demand, was adequately grounded on the question of law: so, adequately grounded on the question of fact. Mandative decree, by the issuing of which the judicial service is rendered, and the effective service commanded to be rendered to the defendant, expressible in the following examples: —

2. Cause of suit, say *corporeal vexation*, or the correspondent attempt, preparation, menace, or challenge. Mandative decree: compensation-ordering, — Pay [so much] in compensation.

3. Cause of suit, *non-performance of con-*

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tract: contract the most ordinary sort, — work done, goods furnished in expectation of value in money, expected on just and adequate grounds. Decree here again, — Pay [so much] in compensation.

4. *Suit publico-private; cause of suit, theft:* goods found on defendant — defendant immediately prehended and adduced by pursuer, confessing, or in vain denying: other witness none. Opinative decree, under question of fact, the goods taken by the defendant; under the question of law, taken under circumstances which make it theft. Mandative decree, under compensative part, Convict, restore the goods: under punitive part, Convict, submit to the appropriate punishment [naming it:] thereupon correspondent subsidiary punifactive mandate to the appropriate authorities.

By execution given to this punishment, correspondent service is rendered to the public at large, say a *securative* service.

In every one of the four sorts of suit, and in every individual of each sort, will be the option of employing either a mandate addressed to the individual at whose hands compliance is expected and called for; or a prehension mandate, addressed to a prehensor, and requiring prehension to be performed either on a person, or a thing, or on both, as the case may be.

Whether the need of prehension has place, cannot be determined with propriety by the mere consideration of the species of suit; that is to say, as to whether it belongs to one or another of the above-mentioned four species.

1. In the case of an individual suit belonging to the non-inculpative species, it may happen that the employment of this instrument, strong and drastic as it is, may be needful.

2. In the case of an individual suit belonging to the criminative species, whether it be the purely-public or the publico-private species, it may happen that the employment of this instrument of security may be needless: indeed, to by far the greatest part of the extent, it will be so.

CHAPTER XVII.

SUITS, THEIR STAGES.

STAGES of inquiry, three: —

I. Original inquiry.

II. Reiterated, recapitulatory, or quasi-jury inquiry.

III. Appellate inquiry.

These are the same in all cases. On each inquiry sittings and hearings in any number.

I. Original inquiry, its business. Judge, after hearings, pronounces his definitive decrees, opinative and imperative, and gives execution and effect, if there be no reiterated inquiry.

II. Reiterated inquiry, its efficient causes:

1. Judge's spontaneous order.

2. On demand by pursuer.

3. On demand by defendant. Spontaneously he *may* order it; on demand, he *must.*

III. Appellate inquiry, its efficient cause, demand from either side.

1. Ordinary time, after definitive judication and before execution.

2. Extraordinary time, after interlocutory decree and before execution thereof: where, but for appeal, interlocutory might have the effect of definitive. Examples: — 1. Undue delay; 2. Precipitation; 3. Exclusion of evidence.

I. *Original inquiry.* Initiatory application, if contentious, as on the occasion of a suit, commences by a public application to the judge, by some person as pursuer, or pursuer's substitute; exceptions excepted, by pursuer.

If upon applicant's own showing, no probable just cause of demand appearing, the suit is dismissed: vexation thus to none but applicant.

Causes for party's non-attendance: —

1. His attendance is impracticable.

2. Preponderantly inconvenient.

3. Plainly useless or needless.

In case of falsehood, coupled with insincerity or temerity, applicant is responsible, as effectually as an extraneous witness. So every other actor on the judicial theatre.

Also for purposed insincerity or temerity, in respect of vexation to party, witness, judge, or any other actor.

Application if causeless, wanton, or malicious, a fine to helpless litigants, or say *equal-justice fund.*

Applicant may bring all or any witnesses, who may all be counter-interrogated.

Applicant, if, with or without other witnesses, he is unable to speak to a certain fact, but indicates one who could probably speak to it, but whom he could not bring, — judge, before dismission or retention, may convene the alleged probable witness; upon like indication of him, another, and so on, till through one or more such indicant witnesses, a percipient witness is found, whose evidence as such is employable.

In so far as the procedure takes this course, it is *investigatorial.*

Penal, the case in which such investigation is most in demand; but it may be in any case in which the importance will outweigh the vexation.

The first mutual attendance will be the defendant's first attendance. Now may all parties bring all their evidences. Better so than not: for thus may matters be settled.

In this case will be the vast majority of suits. Examples: —

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1. Small debts.
2. Trifling assaults.
3. Vituperative oral discourses, with or without others than the parties for witnesses.
4. Small detected thefts.

Be the case ever so complicated, here may generally be settled —

1. The law and facts in issue.
2. In relation to such evidences as have not been adduced, the persons and things to be sought, and their respective places.

By consent of all parties on the other side, on any attendance after the first, the presence of any party or parties may be dispensed with.

II. *Inquiry recapitulatory*, or *quasi-jury inquiry*. The case in which an apt judge will desire it, is where evidences which have been received separately as they could be obtained, require to be confronted. A case in which a party will desire it, is—where to the above use is added that of affording to any error of the judge the corrective applicable by the quasi-jury, with ulterior argumentation on the whole evidence. For the check applied by the quasi-jury, see Ch. XXVI. *Quasi-Jury*.

On this reiterated inquiry, it being recapitulatory, no evidence will be received that could have been produced during the original inquiry: to save time, by consent of parties, the re-exhibition of any lot of evidence may be omitted.

III. *Inquiry appellate*. Its efficient cause on either side, — dissatisfaction with judge's decrees. Sense of exposure to it will be among his checks.

Evidence received here, none but what was received below.

Necessary costs, comparatively inconsiderable: —

1. Sole constant cost, the mere paper of the record.
2. Incidental cost, fees for argumentation by law practitioners.

Matter of the record, — statement of the whole proceedings, evidence included: of this, exemplars from 8 to 12 will have been written at the same time, by the same hand, by an invention in use. Saved thus will be,

1. Time, and expense of skilled labour in revising for correction.
2. Possibility of variances, thence of error.

Record transmitted by post. Expense imposed afterwards on the party in the wrong, if solvent.

Argumentative fees. Case requiring it, and respondent unable, — power to judge below, to defray the expense: to wit,

1. Exacting from appellant, in addition to fees for his own side, the equivalent for those on the other side: or,
2. Ordering money out of the helpless-litigants' fund as above.

Power to judge appellate, to fine for undue appeal coupled with insincerity, temerity, or malice: fine for helpless-litigants' fund.

On any inquiry, sittings and hearings may be in any number as above. Sittings refer to *time* — hearings to *suit*. Divers sittings may each be engrossed by one suit: divers suits may be dispatched in one sitting, each after one hearing.

Under this code, in each judicatory, in every day of the year, are two sittings: one a day, the other a night sitting.

Justice is as needful one day as another: in the dark part as in the light part. A judge can as easily officiate at night, as does a military officer, a watchman, or a man in any other night occupation. A watchman must keep awake: a judge need but be liable to be awakened.

So, out-door sittings as well as in-door. Jurymen on *view* are out-door. More trouble is now produced by the excursion of one judge than by that of twelve jurymen. Not but that *here* the judge carries a public with him; without a public, a judge is a tyrant under the name of a judge: always a tyrant; naturally a corruptionist.

A sitting is either of course, or appointed, or say by appointment: —

1. In course, the judge receives initiative application.
2. By appointment, in consequence of an order for attendance at a particular day and hour, to any person or persons after an initiatory application. Night sittings are never by appointment. Out-door-sittings mode of course.

Exceptions excepted, under this code, in all sittings and all hearings, publicity is maximized. For exceptions see *Const. Code*.

The stages of judicature might be thought here more numerous than expressed: an additional one is, to wit, as often as any part of a suit passes from one judge to another, particularly from a depute to the principal judge. This, however, is frequently matter of necessity in all systems.

Place does not change here as there; nor thence is the vexation of transition imposed on parties and witnesses. In general, where change has place, the original inquiry will be by a depute — the recapitulatory, *i. e.* the quasi-jury do, by the principal. Desirable it is, in proportion to complexity, intricacy, and importance, that by the judge who ultimately decides, all the evidence should have been heard, that the whole may have presented itself to him in the same shape, and that the best.

By the judge who extracted the *viva voce* evidence should the immediate decree, in as far as possible, be pronounced

Under existing system, for avoidance of

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responsibility, judges several on the same bench: one of them elicits the evidence, whilst the others only pronounce the decree.

In this arrangement, profit the sole object attended to.

CHAPTER XVIII.

MEANS OF EXECUTION.

§ 1. *Execution, what.*

By execution, understand that series of operations by which, on each individual occasion, execution and effect is given, or endeavoured to be given, to that portion of substantive law on which the demand made by the pursuer grounds itself. It is the series of operations, by the last of which that judicial service is rendered, the performance of which is the object of the demand so made.

What is done by this same operation, is the application of one or more of the remedies which, in case of wrong, the law has provided and ordained to be applied.

The portion of law, execution and effect to which is the object of the demand, is either a portion of law ordaining in what case and manner an *impetrable* right shall, on an application made by the possessor, be converted into a consummate right; or a portion of law by which one or more of the remedies, in consideration of some wrong, of the number of those of which its list of remedial wrongs is composed, is or are ordained to be administered.

By respite, understand respite of execution, in so far as, when, on a certain day and hour execution ought, according to general rules, to be performed, the performance thereof, on account of this or that particular circumstance, is deferred unto some other period or length of time.

§ 2. *Modes of agency applicable to the purpose of execution.*

Dependent of course on the mode of operation employed on the occasion, and for the purpose in question, will be in every case, the execution and effect given or not given to the decree in question.

This will of course depend partly upon the nature and condition of the agents, but in a more particular manner upon the nature and condition of the subject-matters operated upon.

As to the agents operating, they will in every case be either persons or things, or both: in so far as they are things, of course they will be things in the hands of persons.

As to the subject-matters of operation, in so far as they come under the denomination of *persons*, the faculties operated upon — the faculties to which the operation applies itself — will require to be considered and distinguished.

These will be either the physical faculties, in which case the mode of operation will not be different from what it is in the case of things; or the mental, or say the psychological faculties. In this latter case, they will be either the intellectual or the active faculties: and in so far as they are the *active faculties*, no otherwise can they be operated upon, but through the medium of the *sensitive*.

Execution and effect may be given to the decree of a judge, either by positive agency, or negative agency. If by positive agency, either on persons, or on things: if on persons, either the person ultimately intended to be operated upon, or some intermediate person, by agency on the physical faculties, or by agency on the sensitive faculties; — on the sensitive faculties, either for the purpose of inflicting punishment, or for the purpose of producing compliance: if on things, either on things appertaining to the person in question, the party in the suit, or on things belonging to any other persons taken at large.

In English practice, under the name of *outlawry*, this mode of operation is in ordinary use. But in this case it is indiscriminate, applying to all judicial service, and thereby divesting the delinquent of all rights without exception: or at any rate, without any purposed and deliberate exception. It is moreover conjoined with positive agency, — the property of the outlaw being judicially prehensible, and judicially vendible.

Moreover, the evidence on which it is grounded is that sort of evidence, which in its nature cannot but tend to false results; and on which, if justice were the object, no judgment would ever be grounded. In this case, it takes noncompliance as conclusive evidence of delinquency, in the shape of contempt for the authority of the judicatory; whereas it may as easily be, and perhaps as frequently is, the result of inability to exhibit such compliance.

Under the here-proposed code, this negative mode of agency might be employed with any degree of discrimination imaginable: for by *vivâ voce* examination of the person in question, the whole state of his affairs might for this purpose be brought under view. He might be divested of a mass of property in the hands of this or that person, or of property in the hands of this or that other: he might be divested of an as yet unallowed claim upon property in other hands: he might even be divested of his domestic power in relation to this or that child: or supposing the occasion to warrant it, even of conjugal powers or rights; or the faculty of contracting marriage with this or that individual person

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of the opposite sex, or on part of the female sex, with this or that individual male.

To give effect to any such negative agency, it would be necessary that in giving execution and effect to a decree of this sort, pronounced by one judicatory, all other judicatories should by pre-established law stand engaged to concur: and that actual information of it, effectual and universal information, accordingly be given. In the current systems, this universality of effect actually has place: but as to the receipt of information necessary to prevent injustice, in this as in most other cases, it is treated by them as a matter of entire indifference.

To the decrees of a judge in relation to any person, execution and effect may be given, either with or without the introduction of a person other than the functionaries of justice.

When without such intervention, it will be by mere physical agency in persons or things, as in case of prehension.

When with such intervention, it is by compliance on the part of some person or persons that the effect is produced.

The person in question may in this case be either the defendant, or any other person at large.

On the part of the defendant or any other given person, compliance may be produced by operation on his will, either immediately or mediately through any number of wills, one after another in a chain, as in the case of investigatory evidence.

Call the *chain of communication* in this case a *volitional* chain: in the case of evidence, an *intellectual* chain.

In the way of hostility, or tyrannical oppression, or avowed hostility, compliance has not unfrequently been known to be produced, or understood to be produced, by influence exercised in this unimmediate mode.

In the way of judicature, it cannot be exercised on intermediate agents taken at large, without operating in the character of mislocated punishment, nor therefore without injustice.

But in the case of delinquents, dealt with as such, no reason appears why it should not be employed, in so far as, in the eventual punishment which it involves, no excess has place.

In so far as execution and effect depend upon power exercised by the judge over things, inexecution may be produced by delay, whether the things in question are or are not in the custody or power of the defendant: for in either case, deterioration, destruction, asportation, or concealment beyond recovery, may have place.

Suppose appropriate and adequate security found, provisional prehension and sequestration may on no ground have place in relation to property in the hands of the person intended to be operated upon, whether in the character of a defendant, a pursuer, or an extraneous witness.

As in the one case the object of the judge will be to exclude irreparable damage, so will it equally be so in the other.

On the occasion of the security exacted as a ground for the employment of the means of eventual execution in question, this will accordingly be borne by him in mind.

In the case of things, the mode of operation is mechanical, plain, and easy; so likewise in the case of persons, in so far as the faculties necessary to be operated upon are no others than those physical ones, in respect of which the case is not distinguishable from the case of things.

When the nature of the case requires that the faculties operated upon should be the active, and to that effect the sensitive, then starts up the great mass of difficulty; — then it is, that on the part of the person in question, whatever be the result requisite to be produced, *compliance*, appropriate *compliance* is necessary: compliance with regard to mandates and injunctions, or, to use the word more agreeable to the ear of power, *obedience*: though, in truth, obedience is but one mode of compliance, and the case requires, that be there ever so many modes, they should every one of them be brought to view.

So far as the active faculty and the compliance which belongs to it are out of the question, *forthcomingness* on the part of the subject-matter operated upon, forthcomingness in the physical sense, conjoint presence on the part of some operator and the subject-matter of the operation, are necessary. In this case, forthcomingness is employed in the literal sense. But when, in so far as mind is the subject-matter operated upon, forthcomingness is not, in the literal corporeal sense, necessary: by an operator stationed in London, operation, and that to the purpose of producing compliance effectual, may be performed upon a mind stationed in Van Dieman's Land.

In so far as by mind in one place, mind in another place, (though it be ever so widely distant a place,) is capable of being operated upon, especially if with effect—with the effect of producing compliance, — forthcomingness in a particular shape may be considered as having place: forthcomingness in this shape, call virtual forthcomingness: in the other and more ordinary shape, physical forthcomingness.

Here then, and for the several above-mentioned purposes of probation, communication, and ultimate and effective execution, come to be considered the several possible modes of effecting it: always with the ever concomitant and corresponding view of effecting it

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with the greatest certainty, and, to the purpose of the above-mentioned ultimate end, with the greatest efficiency, and with the least delay, vexation, and expense, to persons associated and interested, whether in the character of parties, witnesses, functionaries, or persons taken at large.

Thereupon call for solution various problems having regard to forthcomingness according to both modes, in relation to which, as above, there was occasion to make the distinction. In the immediately ensuing section, they will find their place.

§ 3. *Of Forthcomingness — to wit, for the purpose of execution.*

By forthcomingness, understand throughout *appropriate* forthcomingness: by appropriate forthcomingness, forthcomingness for the purpose of execution and effect, whether in an *immediate* way, or in either of the preparatory and instrumental ways above mentioned.

Thus have we forthcomingness to any one of the three purposes above mentioned: probation, communication, and immediate and ultimate execution. In so far as concurrence on the part of the will of him on whom the operation requires to be performed, is not necessary, forthcomingness, in the physical and literal sense; — in so far as such concurrence is necessary, forthcomingness in the above-mentioned *virtual* sense; — and in this sense, in so far as the operation by which the virtual forthcomingness is produced is effective, *compliance* is produced and has place.

To be appropriate and effective, forthcomingness, whatsoever be the purpose of it — whatsoever be the subject-matter of it, must be so, not only in respect of place, but moreover in respect of time.

Hence, in the case of forthcomingness for the purpose of eventual execution, comes the danger of irreparable damage, and with it, a great difficulty: especially as, in this case, what is liable to happen is, that the damage may have been produced in a case in which it was not needed: for that, when the time for immediate execution came, the necessary and requisite forthcomingness would not have been wanting.

Such is, by the supposition, the case, as often as a solvent man who would all along have continued so, is subjected to arrest on the score of debt.

Only in this case, where *eventual* execution comes to be provided for, does the danger of irreparable damage present itself under any particularly formidable aspect: in the case where *actual* execution comes to have place, no danger need be produced beyond that which was intended.

On the subject of forthcomingness, the following are the topics which present a demand for consideration: —

1. To what particular and specific purposes, on the part of what objects or persons in the character of subject-matters, and in what modes, may forthcomingness, physical and virtual, to the general purpose of eventual execution, be necessary.

2. In what shapes or modes non-forthcomingness is, on those several occasions, capable of having place. Of inquiry under this head, the use is that which follows under the next head.

3. In which of those several modes forthcomingness, for the general purposes of execution, is by provision of law capable of being made to have place, and fit to be made to have place.

4. In what manner damage, liable to be produced by the operation of the arrangements having for their object the securing of forthcomingness, and in certain cases, through forthcomingness of compliance, may on the several occasions, on the part of the several classes of persons concerned, be minimized.

This leads to the consideration of the species of damage which in the nature of the case is liable to be irreparable: the shapes in which damage for want of service, or by reason of wrong, must be irreparable. This will depend upon the nature of the subject-matters.

As to descriptions of persons: — 1. First come persons at large, in the character of eventual victims of bodily injury, in its several possible shapes. Of these shapes a general idea has already been given: *purpose*, preserving or rescuing from injury, the person in whose instance the provision for forthcomingness is made, to have place. *Mode* of forthcomingness, — locatedness in some situation in which the thus protected person may be in a state of security against the evil apprehended.

2. Next come persons appearing in the character of applicants. *Purposes* preserving from unjust vexation and expense, persons at whose charge, in the character of defendants or otherwise, the application is made: persons at whose charge the service called for by the application, will, if rendered, be granted and performed. Mode of forthcomingness—of all modes by which sufficient security may be afforded to eventual defendants, and witnesses against vexation, unnecessary and thence unjust, either *in toto* or in degree — of all those several modes, whichsoever shall upon inquiry be regarded as promising to be to the applicant in question least vexatious.

3. Next come cointeressees of the applicant, who, though conjoined with him in respect of interest, have not accompanied him in his application to the seat of judicature. Purposes: — 1. Joining with him in affording, as above, security to defendants and forced witnesses, against injustice. 2. Affording to him security for their bearing along with him,

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their parts in the vexation and expense that may eventually attend the operation of claiming those services, in the benefit of which in so far as the claim succeeds, they will receive a share. Mode, obtaining their personal attendance at the seat of judicature for the purpose of their joint responsibility as above: their attendance, or if without preponderant evil it cannot have place, in some other shape such security as shall be deemed sufficient.

4. Next come witnesses — extraneous witnesses. Purposes as follow: —1. In the case of such as come voluntarily, either in the first instance at the desire of the applicant, or afterwards at his desire or that of any of his co-interessees, security against those for whom they attend, in respect of needless and uncompensated vexation and expense in the exercise of that function; of which security they may in case of need be informed or reminded by the judge. 2. Against falsehood on their part, as well to him at whose request they come, as in favour of the party or parties on the other side, to whose detriment, in the minds of those by whom they are called in, they are expected to testify.

5. As to all the several other actors on the judicial theatre, after what has been said, the purposes and uses of this forthcomingness, as well to each as to all, will not require separate mention.

6. So as to functionaries at large, meaning all such other persons as, not being at the time of the application present at the place at which it is made, may come to their posts to act in the judicial drama. In all ordinary cases, for forthcomingness on their part, the official situations respectively occupied by them will afford sufficient security.

In regard to this matter, whatsoever requires to be recommended as most apt, may be comprised in two rules: —

Rule 1. Of all modes of securing forthcomingness, immediate or eventual — of all modes that promise to be alike effectual, choose that which, with reference to the individual in question, at the time in question, promises to be the least vexatious.

Rule 2. In each case, where the most efficacious is at the same time the most vexatious, weigh against the evil of vexation from execution, the evil from the diminished probability of ultimate execution, and embrace that mode which promises to be the least vexatious.

For this purpose, the circumstances of the individual will in each case require to be taken into account. From the nature of the suit alone, no well-grounded judgment can be formed.

At the commencement of a suit, actual forthcomingness is necessary for one purpose; eventual forthcomingness, and actual security for it, at another time.

In so far as, on the part of the individual in question, testification in the presence of the judge is necessary (or for any other purpose,) the forthcomingness necessary is actual forthcomingness: in so far as such testification is not necessary, actual forthcomingness may not be necessary; eventual forthcomingness, and thence present security for eventual forthcomingness, may be sufficient.

For thus obtaining and securing compliance respecting forthcomingness, the means employable are either such as operate on the body, or such as operate only on the mind: in the first case, they may be styled prehensive; in the other case, accersitive. To employ the prehensive means, is to cause the person in question to be secured wherever he is, and (as a thing moveable might be) brought to the place at which the operation, whatever it be, which it is decreed to perform on him, may be performed: in the case here in question, that of causing him to speak in relation to the subject in question.

The prehensive is always the most vexatious: it ought, therefore, never to be employed but under the expectation that the accersitive will not suffice.

To things, the prehensive is the only one of the two means which the nature of the case admits of. But the prehensive may be performed either by the person in whose custody they are, or by the functionary by whom, if performed upon him, the prehensive would be performed.

When things alone are the intended object of prehension, the appropriate instrument is therefore (unless effective reluctance be apprehended) an instrument of accersition addressed to the person, coupled with an instrument of mandation, requiring him to prehend and adduce the thing.

On what occasions — in what shapes, may forthcomingness with most advantage be made to have place; to wit, to the several purposes of eventual execution, probation, and communication, and in each instance, with least damage?

In so far as the sole purpose in view is the production of forthcomingness, the sole purpose in view is the production of compliance on the part of him in relation to whom the desire is, that he be forthcoming: the question, therefore, respecting forthcomingness, may be changed into a question respecting compliance. The individual being supposed to be, as to the purpose of compliance, forthcoming; which is the most efficacious course, and, at the same time, the aptest in other respects, that can be taken for the securing of compliance?

The problem then here is, at the commencement of a suit, in case of apprehended reluctance and noncompliance at the end of the suit, how to obtain adequate probability

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and assurance of compliance at the end of the suit: compliance, in so far as at the time in question may be found necessary to the giving execution and effect to the decrees, which the judge may eventually see it right to issue.

In other words, what are the obtainable — and of those obtainable, what the most apt, and thence desirable, pledges for the defendant's compliance with such decree as it is in the contemplation of the judge to issue?

Forthcomingness in relation to the fictitious entities termed *rights* — forthcomingness in the physical and proper sense, — actual forthcomingness, cannot have place: not so in the improper, but not the less necessary sense — not so that which may be termed virtual forthcomingness.

As to the mode in which forthcomingness with relation to these fictitious, but not the less valuable objects or subject-matters is capable of being employed, and thence the purposes, to which it is capable of being employed to effect in the most beneficial manner: these are as follows, —

1. In the case of such as are transferable, — eventually employing the right in the character of matter of satisfaction.

2. In the case of those which are untransferable, as well as those which are transferable, — employing them as instruments of punishment: for in so far as abstracted, in that character may the matter of good in this as in any other shape be employed.

3. So the employing them in the character of instruments of constraint or restraint.

The shapes in which nonforthcomingness may have place, — the causes by which at the time in question it may be produced, are —

I. Nonforthcomingness of persons.

1. Take, in the first place, those which have place on the part of a person, and not on the part of a thing. Of these, take the following for example: —

1. Incarceration.
2. Relative confinement (territorial.)
3. Relative infirmity of body, not incurable.
4. Relative infirmity of body, incurable.
5. Relative infirmity of mind, not incurable.
6. Relative infirmity of mind, incurable.
7. Relative infancy.

By relative, understand, in such sort and degree as to the purpose in question, in the individual case in question, to operate superably or insuperably, as an obstacle to forthcomingness.

II. Nonforthcomingness of persons and things.

Take, in the next place, those cases in which this obstacle is capable of applying not only to a person but also to a thing; at any rate, to a thing of the moveable class.

1. Expatriation precedential or antecedential; to wit, to the time of the application made.

2. Expatriation consequential or subsequential, apprehended.

3. Exprovenention precedential as above.

4. Exprovenention subsequential, or consequential apprehended.

5. Latentcy, — the place kept purposely unknown with relation to the time of the application: this may be antecedential or apprehended, consequential or subsequential, as above.

In the case of persons, forthcomingness may be necessary, and nonforthcomingness a source of irreparable damage, in any one of these capacities: —

1. As subject-matters of wrong or injury.
2. As sources of remedy for injury.
3. As sources of evidence.
4. As instruments of communication; to wit, with reference to such subject-matters, between which, communication is capable of being made to have place.

In the case where, by forthcomingness, a person is capable of being a source of redress or remedy, the means by which he may be so are as follow: —

1. By being compelled to administer satisfaction.
2. By being compelled to suffer punishment, for the general benefit of justice.
3. By being induced, by whatever means, to afford evidence.
4. In particular situations as to *time* and *place*, by being employed as an instrument of communication; to wit, between any of the several subject-matters above brought to view.

Of the want of forthcomingness on the part of a person in any one of the above-mentioned several capacities, irreparable damage is capable of being the result.

Of forthcomingness on the part of things, the purposes may be — 1. Securing from damage, and in particular from irreparable damage, the thing in question, and all who have an interest in it. In the case of a suit of which a thing is the object or subject-matter, these will naturally be, the applicant, and if he has any, his cointeresees.

2. Preserving it from being converted into an instrument of mischief, regard being had to the proprietor, or any other person in whose custody or power it may happen to be lodged.

3. Employing it as an instrument of compulsion or restriction, for the extraction of forthcomingness, or of compliance in any other shape at the hands of any person by whom any interest in it is possessed.

4. Employing it as a means of affording satisfaction, whether identical or compensational, as the case may be: or in default of other means, even as a means of punishment.

The eventual forthcomingness produced for the purpose of execution, whether it be the forthcomingness of a person or a thing, may

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be either the ultimate or the instrumental object of what is done. Thus, where it is instrumental, the forthcomingness produced on the part of a person may have no other object than the producing eventual forthcomingness on the part of a thing; or the forthcomingness produced on the part of a thing may have no other object than the producing eventual forthcomingness on the part of a person: the owner of a horse may be taken into custody, for the purpose of causing him to give up the horse; or the horse may be taken into custody, for no other purpose than to cause the owner to pay attendance at the judicatory.

Nonforthcomingness or noncompliance may have been produced by any one of the several causes following:—

1. Want of notice, *i. e.* knowledge of the obligation and demand.
2. Want of power.
3. Want of will.

Supposing notice given and received, either want of power or want of will has been the cause of it.

Supposing power not wanting, only can want of will have been the cause of it.

Of want of power, the cause may be, with relation to the person in question, either intrinsic or extrinsic: intrinsic, as in case of infirmity whether of body or mind, permanent or temporary: if extrinsic, it may be natural or factitious; natural—for instance, the state of the weather or the road, whether in the state of unaptness or distance; factitious, as in the case of an insuperable impediment, imposed by any human hand.

When will is wanting, the deficiency will have its cause in the contemplation either of the immediate or of the ultimate object, in the endeavouring to produce the forthcomingness, as the case may be: in either case, in the contemplation of the suffering which may be the result of it.

When for the purpose of punibility, or satisfaction, forthcomingness of the person does *not* exist, it may still exist for the purpose of testification.

Letters from Europe reach Van Dieman's Land, and a letter from a judge to an individual there, need not find more difficulty in doing so, than a letter from a father to a son. The answer might come either without the intervention of any functionary there, as does in England the answer to a bill in equity; or in case of need, supposing a judicatory upon the plan of this code established there, the ministry of the judge might be employed there, in securing correctness, completeness, and clearness, by *vivâ voce* interrogation, in the same manner as in England.

III. Nonforthcomingness of rights. In this case, no other cause can nonforthcomingness have, than the nonpossession of that authority by which rights are maintained or annihilated at pleasure. In the case of rights, forthcomingness, then, is a state of things which can never fail to have place—nonforthcomingness, a state of things which never can have place.

§ 4. *Of Procedure inter distantes.*

When parties on both or all sides, with sources of personal, written, and real evidence, are all stationary and within the local field of the same immediate judicatory, it is well: and happily, in this case are most suits, and most occasions of demand for suits: and in this case, unavoidable delay, vexation, and expense, are minimized.

But what is unhappily not impossible is, that these several objects, individually taken, may, if fixed, be each of them under a different judicatory; each of them in a state of migration: all of them in the field of one and the same foreign judicatory, of one and the same foreign state; or each of them in a different judicatory of the same foreign state; or each of them in some judicatory of a different foreign state: and of each of these objects, the number may be indefinitely great.

Thus complex, consequently thus embarrassing, may be the state of things for which provision may require to be made.

In so far as the field of operation extends not beyond the local field of dominion of the political state in question (distant dependencies at the same time, with their necessarily half-independent official establishments, out of the question,) the difficulty is not insuperable: nor yet would it be insuperable, if nations so contiguous, that of the dominions of each, some part were nearer to some part of the other than to some part of its own, had each of them to this purpose the same system of procedure. But how distant the prospect is of any such extensive good, in this or any other shape, is but too manifest.

On this occasion, when difficulty is spoken of, it is on the supposition that the maximization of the happiness of the greatest number being the all-comprehensive end in view, the adjective branch has for its end in view, maximization of rectitude of decision, and minimization of delay, vexation, and expense.

But under the current systems of procedure, no such difficulty has place: nautically speaking, all is plain sailing. Knots, how numerous soever, are all dealt with in the same manner; all dealt with in the manner of the Gordian knot. For all of them, one sword serves—sinister interest in the hands of the appropriate constituted authorities, but more particularly those of the lawyer tribe. To maximize the number of suits and defences that will afford lawyer's profit, maximizing at the same time the quantity of such profit extractible and extracted from each—to minimize

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at the same time the number of suits that will not afford lawyer's profit: such are the conjunct ends to which, in so far as depends upon that tribe, all arrangements and proceedings under them are directed. As to the maximization of rectitude of decision, taking the law for the standard, it is matter of indifference: as to the minimization of delay, vexation, and expense, it is matter of abhorrence, seeing that minimization of lawyer's profit would be among the results of minimization of expense.

Suppose this case: — pursuer one, defender one; condition of both stationary, but domicile of pursuer in the field of one immediate judicatory — domicile of the defender in that of another.

In this case, the simplest course, and in general perhaps the least inconvenient, will be for the plaintiff to repair in person to the defendant's judicatory. To the plaintiff, this arrangement will be the most convenient in respect of the faculty of judicial compensation — a faculty which, if the right be on the pursuer's side, will be in most cases of prime use to him, and cannot, in any case except in respect of the vexation and expense of migration, be in any way disadvantageous to him.

Note, — that by the rules of procedure, preference in respect of priority in hearings should on this account be given to parties coming from a distance: for the like reaon, so also to extraneous witnesses.

But what may also happen is, that not without preponderant inconvenience, or perhaps not on any terms, is it in the power of him who would be pursuer to make this migration. In this state of things, either examination through the medium of writing must be admitted, or execution and effect cannot be given to the portion of law on which the right of the pursuer to the services of the judge, for the purpose of his demand, is grounded.

Examination of a person, party, or extraneous witness, through the medium of writing, is, in the nature of the case, performable in either of two ways: immediately without the intervention of any judge; or unimmediately with the intervention of the judge, sitting in the justice-chamber of the judicatory under which the defendant has his abode: — mode, in the first case, the epistolary mode; in the other, the distant-examination mode.

In the case where, through the intervention of writing, the judge is occupied in the business of examination as above, the writing must have been addressed to the judge. For suppose no such writing addressed to the judge, and yet the judge employed, the case must be, that though the pursuer is not present, some substitute of his is; and if so, the case is the same as if the pursuer himself were present, except that the defendant has not in this case the benefit of extracting information and admissions from him, as if he were on the spot.

It being supposed that it is by the medium of writing addressed and communicated to the judge that the examination is performed, what is possible is, that the instrument of examination consists of nothing more than a string of interrogatories, to which it is the business of the judge to extract answers. In this case the examination is performed in the same manner as when, in the English equity courts, the examination of an extraneous witness, or of a party considered in the character of a witness, is performed.

In that case, be the importance of the cause ever so great, this vital function is abandoned to some obscure underling whose name is never known, and who acts in secret, no third person being present, and who in relation to the matter in dispute has no other information than what the interrogatories give him — a sort of information which in the case of the epistolary examination of a defendant by the initiatory discourse of a pursuer, termed the bill, is not admitted as sufficient: to authorize the exaction of an answer, a correspondent assertion on the part of the pursuer is made indispensable, though that assertion is, without check or pretence of check, allowed to be false, and is so perhaps as often as not.

As to these two modes, there seems no reason why the option of them should not be given by law to the pursuer: in some circumstances, the one will be the more advantageous to him, supposing him in the right; in others, the other.

If performed in the purely epistolary mode without the intervention of the judge, the examination of the defendant will in so far be performed in the same manner as under the authority of an English equity court it is performed on a defendant, in and by the initiatory instrument called a bill; except that in such bill, to the string of interrogatories is prefixed a vast mass of irrelevant matter composed of lies and absurdities, such as in any system of procedure which had justice for its object, never could have had place.

In this case, unless by accident, the pursuer's judicatory has at command some means of justiciability, sufficient in the case in question to ensure compliance (property, for example, susceptible of prehension,) the pursuer will not have any means of securing ultimate compliance with his demand, nor in the meantime, responsion to the purpose of giving effect to it, without the intervention of the defendant's judicatory.

Under these circumstances it seems scarce possible to secure prompt and effectual responsion without full communication on the subject with the judge — a communication not less full than what would require to be

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made by the pursuer to an agent of his own. On the part of the defendant, suppose (what will always be the most common case) complete reluctance, the following are the courses which it will take:—

1. In the first place, non-responsion, viz. down to the last moment, and for the procurement of toleration, excuse upon excuse, if any, are admitted. True it is, that for securing the correctness of such excuses, and thence the absence of them, where no proper excuses have place, punishment for mendacity, insincerity, or rash assertion, will in course be impending: but of such restraining powers the efficiency cannot in every case be complete. For, with a little ingenuity, under circumstances tolerably favourable, excuses, which if they came of themselves would be just and adequate, may be brought into existence.

2. The stores of non-responsion being exhausted, next comes insufficient responsion: on the defendant's part, the insufficient responsion; on the pursuer's part, indications of the sufficiency, with directions for the supply. To the length of this series — to the number and respective magnitude of the terms of which it may be composed, it seems not easy, if it even be possible, by any general view that can be taken of the subject, to set limits. For producing the effect that would be aimed at by any such limits, a course that presents itself is this:—on the pursuer's part, facts, which if true would be sufficient (notwithstanding anything that could be said on the other side) to substantiate the pursuer's claim, are hypothetically asserted, accompanied with a statement, that to that special purpose, true or untrue, unless sufficiently contradicted, they shall be regarded as admitted.

Hence, on a general view, may be seen the difficulties with which, in every case in which there is no judicial confrontation of parties, a pursuer may have to contend. Without his presence, an agent, however ample his instructions, though acting in the presence of the defendant as well as the judge in the distant judicatory, may be but an inadequate substitute.

If an agent chosen by the party as the most likely, more so than any other person he has access to, to espouse his interest with the greatest warmth, and thence to apply his faculties, such as they are, to the subject with the strongest force of attention, is liable to be thus inadequate, — still more so, generally speaking, will be the judge. Skill derived from appropriate practice and experience, say still greater; but for the natural deficiency in the article of zeal, it were too much to expect that, by any extra magnitude of skill, compensation will in an adequate degree be made.

What may be said in general is, that the less complicated the case, the greater the probability is, that, without the judicial confrontation, examination in the epistolary mode can be made sufficient for a well-entitled pursuer's purpose. To make his option between the two modes, will therefore rest on the pursuer in each individual case.

A case in which the services of the distant judge might be employed in this good work with particular advantage, is this: a pursuer by reason of his occupation or state of health, is incapacitated from migrating to the distant judicatory, and staying there for the requisite time; and moreover, by the state of his pecuniary circumstances, incapacitated from engaging the services of a professional, or other apt agent. Here might be a case of compassion, calling for the conjunct operation of the judge of the pursuer's judicatory, and the judge of the distant judicatory, namely, the defendant's judicatory. The pursuer-general, in his quality of advocate of the poor, extracts from the mouth of the pursuer, in the presence of the judge, facts which, in his view, and in the view of the judge are, if true (the contrary of which he sees no ground to suspect,) sufficient to constitute an adequate ground for the pursuer's demand; at any rate if supported by such evidence as the pursuer, subject to punishment as for insincerity, has stated as being about to be proved by such persons as he has given indication of.

The minute in which this evidence is contained, being authenticated by the signatures of the pursuer-general and the judge, accompanied with such explanatory observations, if any, as shall by them have been deemed requisite, is transmitted by this same judge to the judge of the defendant's distant judicatory, with a request to him to convene the defendant, and proceed thereupon as the justice of the case may require.

What has been above observed in relation to the case where, at the instance of a pursuer, a defendant is at the commencement of a suit to be examined, will, to an extent more or less considerable, be found to be applicable to the case where, on that same side, or on either side, a person is to be examined in the character of an extraneous witness. Considered merely in the character of a witness, one part of that which would commonly compose the subject-matter of examination in the case of a defendant, has no place in the case of an extraneous witness. This part is what is composed of the subject-matter of admissions. The facts proposed to be admitted may in any number be facts of which the defendant has no personal cognizance; he not having been, in relation to them, himself a percipient witness, but being satisfied of their existence, either from report made to him by percipient witnesses, or by inference drawn from circum-

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stantial evidence. From an extraneous witness, nothing in the way of admission, as above, will be relevant; the only facts, the statement of which can with propriety be received from him to the purpose of their operating in the character of appropriate evidence, will be those in relation to which he has been a percipient witness: as to any other facts, if his testimony be in any way relevant — if it be capable of throwing light on the matter in dispute in any way, it will be in the character of purely indicative evidence, giving information of a source from whence appropriate evidence may, it is supposed, be extracted.

As to indifference, although it may have place, and of course not unfrequently will have place, it is, however, no more to be depended upon, consistently with common sagacity, in the case of an extraneous witness, than in the case of a party — on the occasion here supposed, a party on the defendant's side. By interest in every imaginable shape, self-regarding, sympathetic, and antipathetic — by a tie of interest, of any degree of strength from that of a cob-web to that of a cable — from the slightest imaginable, up to an interest equal in strength to that of the party himself, or even greater, may the affections and correspondent conduct (that is to say, on the present occasion, the discourse of the extraneous witness,) be determined. By correspondent variations in respect of frame of mind as between a party defendant and an extraneous witness on his side, the bias towards that side in the mind of the extraneous witness may be made even stronger than that in the mind of the defendant himself. Many, there can be no doubt, have been the occasions on which, for the purpose of giving support to the side of a defendant in a suit, in which, for the advancement of his own interest, the defendant would not have transgressed the line of truth, an extraneous witness has, without solicitation on the defendant's part, or intercourse held with him immediately or unimmediately, transgressed that same line in such sort as to have fallen into the guilt of perjury.

Of these observations, what is the practical bearing on the case here in hand? It is this, viz. that as to reluctance in the mind of an extraneous witness, a degree of it may not unfrequently have place, not inferior but even much superior to any that has place in the mind of the defendant himself. In a way perfectly simple and intelligible, a difference not greater than that which is continually exemplified between two persons standing in these two relations one to the other, will suffice to realize this at first sight apparent paradox, without recourse to any such untangible state of things as that of a difference between two minds. The supposition is realized as often as an extraneous witness in indigent circumstances has in expectancy a benefit, the value of which to him in his circumstances is greater, than to the defendant in his affluent circumstances is the value of the whole subject-matter of the dispute.

Generally speaking, in the situation of extraneous witness, the quantity of matter required to be extracted from a man will be, to an indefinite amount, less abundant and more simple than what will require to be extracted from a man in the situation of a party defendant. Most commonly, the fact in relation to which he will be called upon to testify, will be some one fact, in relation to which he has been a percipient witness; while the facts which, for the purpose of one and the same suit, a pursuer may have need to establish as against a defendant, may be indefinitely and highly numerous.

The practical conclusion is, that, generally speaking, examination in the epistolary mode, with or without the intervention of the judge of the distant judicatory, will be more frequently found eligible, as applied to the situation of an extraneous witness, than in its application to the situation of a party defendant.

As it can seldom fail to happen that, in the situation of pursuer, a party may have need to extract admissions or testimony, or both, from the lips or hands of a defendant, so what will be continually happening is, that on his part, the defendant may have like need to extract admissions or testimony, or both, from the lips or the hands of the pursuer.

Under the authority of the English equity courts, where this sort of reaction has place, the lawyer tribe have given themselves the benefit of making for themselves an additional suit out of it. This suit is called by them, a crossed suit, or a cross cause: and forasmuch as, on the part of the plaintiff and his professional advisers and assistants of all classes, reluctance in respect of admissions and testimony may be not inferior to what it is on the defendant's side, hence it is, that by a state of things thus frequently occurring, the delay, vexation, and expense, with the profit extractible and extracted out of the expense, is doubled: and this in the perhaps comparatively rare case (relation had to the sort of causes carried into those courts,) of a suit so simple as to have no more than one party on each side.

So much for testimonial evidence, received or extracted for the purpose of the suit. Remain, ready-written, and real evidence. In this case, comparison had with those which precede, but little difficulty has place: on the part of the written document, no reluctance to the being produced; as little in the case of real evidence, unless a possible exception be considered as having place in the case of an

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animal, to which, while perception is ascribed, reason is denied. But in this case, whether it be a canary bird or an ostrich, a Guinea pig or a royal tiger, no obstacle imposed by reluctance is apt to be found insuperable.

But all ready-written evidence, and all sources of real evidence, have this in common with one another, and with every source of oral evidence, viz. that they are in the custody of some keeper; and on the part of this keeper, whether it be in the character of party defendant or extraneous witness, reluctance in any degree may have place.

The case is not much varied, where instead of appearing in the character of a source of evidence, the written instrument, or the other thing in question, of whatever sort it be, has need to be made forthcoming in the character of a subject-matter of the dispute. Of the demand on one side of the suit: of the defence on the other. The same horse which constitutes the subject of the pursuer's demand, and which, in case of success on his side, will be to be delivered into his possession, may in the mean time be to be inspected, for the purpose of ascertaining the condition the animal is in, and thence its value.

In the cases last mentioned, the difficulty of obtaining, at the hands of a relatively distant judicatory, the assistance requisite to justice, may be considered as being at its minimum.

Ready-written evidence affords modifications in relation to which, appropriate arrangements will require to be made in detail.

Documents, of the contents of which the temporary concealment is necessitated by some exigency of the public interest, must not, during the time of such concealment, be rendered accessible at the command of private exigency or private artifice.

To maximize for all these several purposes, the facility of intercourse between judicatory and judicatory, will be among the cares of the system of procedure. For this purpose alone, were it applicable to no other, the sort of establishment so extensively known under the name of the post, might be worth instituting and keeping on foot, where it is not instituted and kept on foot.

By the transmission of the record itself from the immediate to the appellate judicatory, instead of a transcript, — delay, vexation, and expense, may to no small amount be saved. A transcript would indeed require no more time than the original for its conveyance. But for the transcription, time in no small quantity will be requisite. This time cannot easily be other than official; and of official time thus employed, the quantity cannot be otherwise than limited. Documents liable to be of such importance cannot safely be located, though for ever so short a time, in any other than well known hands. In English procedure, the transmission of a record in the original, from an immediate to an appellate judicatory, is familiar practice: it is the result of the sort of imperative decree known to lawyers by the so unexpressive appellation of a *writ of certiorari*, or for shortness, a *certiorari* In this case, the document continues at the seat of the judicatory, by the authority of which the transmission of it was exacted.

By retransmission, the purposes of justice may be better served; but among the purposes of the system here in question, the purposes of justice never have had, nor ever could have had place.

§ 5. *Friendly Bondsmanship.*

A friendly, or say accommodating auxiliary judicial bondsman is, as we have seen, a person who, on the occasion and in the course of a suit, lends his aid to one of the parties, by taking upon himself an eventual and future contingent burthen, for the sake and purpose of conferring on that same party a present benefit reputed more than equivalent.

To a party on either side of the suit is this good office capable of being rendered.

It may be rendered in every part of the course of the suit, on any occasion, for any purpose.

Of the case in which it may be rendered to a party on the pursuer's side, an example is as follows:—

According to the evidence delivered by a pursuer, circumstances on the part of the defendant are such, that unless for the giving ultimate execution and effect to a decree establishing the pursuer's demand, arrangements of security are taken, onerous to any degree not exceeding the burthen of such ultimate execution, — the probability is, that the necessary means of giving effect to such ultimate decree would not be obtainable.

In any number, any persons may be co-auxiliary bondsmen for any person.

But it will be for the care of the judge that this accommodation be employed in such sort as not to produce without his intention a commutation of corporal for pecuniary punishment.

In respect of judgment, attentiveness, and even probity, the reputation of the judge stands pledged for his not suffering this faculty to be employed as an instrument for the evasion of justice, as by acceptance given to bondsmen whom the event shall have shown to be insufficient.

Of the demand for security in this or some other shape, the urgency will be directly as the magnitude of the evil to which the proposed defendant will, by being constituted such, be exposed, and inversely as the responsibility of the applicant in respect of his condition in life.

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On this occasion, the party primarily benefited is the proposed pursuer; for, but for this benefit, the benefit which by the legislator is intended for him, might by the judge be denied.

The security thus afforded to a proposed defendant against vexation at the hands of a proposed pursuer is but one of divers securities, of which, on every occasion on which by the judge a security is regarded as necessary, the least burthensome will be preferred.

Where the co-sponsors, or say co-accommodationists, are more than one, the loss will be divided according to pecuniary circumstances, as in cases of compensation for wrong.

On the accommodation-engagement instrument, the matter of the accommodationist's code will have been printed. A separate register will in every judicatory be kept, under the name of the accommodation-register.

In the accommodation-register, on the occasion of each individual-accommodation-engagement, from this elementary matter, general matter under correspondent heads will be deduced at the end of each year, for the whole of the year: —

1. Name of the suit, and the occasion on which the accommodation bond is entered into.

2. Inconvenience saved by the accommodation-engagement.

3. Party to whom the inconvenience was saved.

4. Person on whose application to the judge, the engagement was entered into.

5. Time during which the engagement is to continue.

6. Result of the engagement — the inconvenience incurred or prevented.

Subject-matters, which for the purpose of securing compliance to a judicial mandate are in general capable of being acted upon, are property and person: by possibility, reputation and condition in life; but so rare and extraordinary are the cases in which to this purpose they are capable of being acted upon, and so precarious is the success of any endeavours for that purpose, that they may be put aside as not worth insisting upon in comparison with either of the two others; to wit, person and property.

In regard to property, a circumstance that presents itself at first view is, that in the case of a great part of mankind, persons under age included, or in the case of a considerable proportion, indeed considerably the greater part, co-subpossession has place.

To execution, whether provisional (or say instrumentary) or definitive, cooperation on the part of him at whose charge it is to be performed, may be necessary or not: if, and when necessary, *compliance* on his part requires to be produced.

Universal accommodation having been the end in view of this institution, in so far as it has any end in view, such accordingly is the use and application hereinabove made of it. Occasions, as many without exception as those in which this effect could be given to it; sides of the cause both, on the one with the same facility as on the other; number of persons admitted to the exercise of this beneficent function, in whatsoever number disposition is found to have place, and the exigency of the case is found to require: number no more than one, where the means and situation in life of that one are sufficient; number to any amount greater than one, where for the eventual sum necessary to constitute the security, a smaller number will not suffice.

How in these several respects stands English practice? On the plaintiff's side, to afford a warrant to the burthen imposed on the defendant, this security, originally with parade established, has little by little, as it were by stealth, and for the evident predatory purpose above intimated, been withdrawn. Number in every case two, however superfluous one of the two might be; number never greater than two: consequence, where two could not be found to make up the quantum of security thought fit to be exacted, the security not given, and for want of it, the inconvenience, how great soever, imposed.

No facility is allowed of acting upon property. On the other hand, — on person, such is the facility afforded for operating, that within the memory of man, any person might, on pretence of giving commencement to a suit, for a longer or a shorter time as it might happen, deprive any man whatsoever of his liberty, without having, or so much as fancying or pretending to fancy that he had any right to do so. Against wrong by abuse made of this unbounded power, no security afforded beforehand, no remedy by compensation afterwards. At one time, indeed, something in the way of security was provided: witness the clause *si fecerit te securum*, with which the order of the sheriff, authorising and commanding him to exercise this afflictive power, at one time commenced. By this clause, of which originally some sense of shame had produced the insertion, a certain limit was applied to abuse. But by limit thus applied to abuse, limit was applied to profit, and no such limit could judicial rapacity endure.

Thus was the liberty of every man sold to every man who would pay the price for it, without any other pretence than an intention to pursue a claim of debt for any amount, how small soever, and without charge of crime in any shape.

But when crime was imputed, and intended to be prosecuted — crime to any amount, how-

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soever large; then came tender mercy, and caution, by which a vast and complicated system of machinery was set to work, and proportionable uncertainty and chance of escape for criminality produced. Now was set to work the grand jury, with the number of its members necessary for concurrence, from twelve to three and twenty, to take cognizance of the sufficiency of the grounds on which this power was applied for, and oath of secresy taken by all its members, lest by disclosure the person whom, on hearing evidence, they had pronounced guilty, should find means of escape; which escape might on every occasion be produced without the smallest difficulty or danger on pretence of tender-heartedness, by any one of a set of men by whom, in the capacity of petty juryman, after difference of opinion, no verdict could ever be given without commission of perjury.—Contrast this tenderness for, and security afforded to all criminals, with the utter denial of all security to those to whom no criminality in any shape was so much as imputed, by an oppressing adversary.

The first occasion on which the alleviation of this hardship was conceded, was that on which it was granted to a suitor, who in the character of a defendant had been punished as above, without so much as pretence of criminality on his part in any shape. If two persons could be found, each of whom in case of his escape, was content to bind himself to double the amount of the sum claimed on the score of debt, he was then, in the event of their being approved of, and so binding themselves, released from imprisonment, after having suffered it till they could be found. These bondsmen were, by a joint appellation, termed bail. No bail, no release.

CHAPTER XIX.

COUNTER-SECURITY.

§ 1. *Counter-security, what.*

COUNTER-SECURITY, is security for the defendant against oppression, designed or undesigned, producible at the instance or on the behalf of the pursuer, by the exaction of preliminary security for the reddition of the service demanded by the pursuer.

It is constituted by, and is in proportion to the responsibility, satisfactional and punitional, eventually imposed on the pursuer; to wit, in case of oppression, as above; particularly if falsehood be employed in the production of it.

Considered as to the person on whom imposed, it is either direct—(directly seated;) or collateral—(collaterally seated;) directly, in so far as imposed on the pursuer alone: collaterally, in so far as imposed on a pursuer's bondsman, whose consent to be subjected to the burden has been procured, by some tie of self-regarding or sympathetic interest.

Considered as to time, it is either actual, in so far as the burden of it is actually imposed: or eventual, in so far as the burden is only made eventually imposable.

Of the employable *species* of counter-security—of the *shapes* in which, of the judicial operation by which it may be afforded, examples are the following:—

1. Impignoration pecuniary,—exaction of the deposit of a sum of money under the charge of the registrar.

2. Impignoration applied to things moveable, of condensed value: say, for instance, precious stones, or gold bullion, or costly paintings.

3. Impignoration applied to things moveable, of ordinary value: for instance, household furniture, or stock in trade in any shape, by consignment to some special trustee, located by the judge.

4. Impignoration, applied to a thing immoveable, by consignment as above.

In these last three cases, the impignoration may be termed quasi-pecuniary.

5. Impignoration of miscellaneous and detached rights, by suspension and eventual ablation of them.

6. Impignoration applied to the person—by incarceration for safe custody.

7. Impignoration, by quasi-incarceration, confinement within boundaries not physical but ideal, prescribed by mandate.

In choosing the species of counter-security, the judge will have regard to the following rules:—

Rule 1. Prefer a shape or species, by means of which compensation may eventually be afforded to the defendant so far as it goes, to any by which no such satisfaction can be made to be afforded. Hence,

Rule 2. Give to the security the pecuniary or quasi-pecuniary shape, according to the amount of it, in preference to every other.

Reasons: By the burthen of compensation, the effect of punishment, according to the amount of it, is produced; whereas by barren punishment no such effect as that of compensation is produced.

As to satisfaction in a vindictive shape, this would equally be produced by compensation to the same amount.

Rule 3. In so far as sufficient, prefer the least afflictive shape: accordingly, announcement of eventually imposable, to actually imposed.

Rule 4. In so far as consented to, employ counter-security with less reserve, than the preliminary security. Reason: The individual is the most competent judge of the degree of the afflictiveness in his own instance:

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if the burden be too afflictive, he will not subject himself to it.

Rule 5. With a view to degrees of afflictiveness, never lose sight of the difference between the situation of the two parties, in respect of pecuniary and other circumstances.

§ 2. *Counter-security, need of.*

The need of counter-security is produced by, and proportioned to, the magnitude and probability of the evils which, by prehension and adduction of the individual, are liable to be produced for want of it. These evils will have their rise, partly in the situation of the proposed defendant, partly in the disposition and situation of the pursuer.

Of the evils liable to be produced by the situation of the proposed defendant, examples are as follows:—

1. The proposed defendant, labouring under a disease for which a distant climate is, by medical advisers regarded as affording a probable, and the only means of escape from impending death. Effect of the execution, of the prehension and adduction mandate — the same as that of a sentence of death pronounced and executed.

2. The proposed defendant is on the point of embarking with a cargo for sale, in which the whole of his capital is invested: before he could have been set free to embark, the vessel has sailed, and, within the time, no person able and willing to undertake charge of the cargo could be found by him. The consequence is, a part more or less considerable spoilt, purloined, or sold to a loss: to the amount of the loss no assignable limit. Effect of the mandate, fine with execution to that amount.

3. In the vessel went a female, to the proposed defendant an object of matrimonial pursuit with prospect of success: the female faithless; consequence, her marriage with another: loss indescribable and incalculable.

4. Destination as before: the female a new-married wife. In the vessel, or on arrival, she finds a seducer; consequence, seduction: loss again incalculable.

In each instance, — cause of the evil, accident, — or sinister design. If sinister design, for proposed defendant, say *victim* or *intended victim.*

1. In case of the disease: victim, say a rich proprietor: machinator, a next of kin, or expected legatee.

2. In the case of the emigration with a cargo: machinator, say a rival trader.

3. Victim, the disappointed lover: machinator, the successful rival.

4. Victim, the new-married husband: machinator, the seducer.

In no one of these cases, unless specially provided against as below, does the machinator stand necessarily exposed to legal responsibility in any shape. To the accomplishment of the design, no mendacity, punishable or so much as unpunishable, is necessary. Many are the ways in which, for any such purpose, the machinator may, in relation to the intended victim, contrive to place himself in the situation of creditor.

In the shape of a bill of exchange in which the proposed victim stands as drawer or indorser: in this shape, or no matter in what other, he obtains the efficient cause and probative evidence of a debt which, without injustice or imprudence, the debtor may have left outstanding, having before his departure left in proper hands funds adequate to the purpose.

Nor is it necessary that the hand by which the evil is produced should be that of the principal and prime author. It may be by that of an instrument of his, rendered such by deceit. When the maiden has lost her lover, or the wife her new-married husband, the seducer, full of sympathy and assumed wrath, flies to her relief, and wins her affections.

Of disposition on the part of the pursuer, examples have been seen as above. His situation, unless appropriately modified by counter-security — his situation, in the case of sinister design, whether principal, or instrumental and accessary, as to effective responsibility in every shape, is completely irresponsible.

Happily, in the general run of cases there will be little difficulty. On the one hand, the nature of the service demanded, coupled with the situation of the defendant, will not require for the securing compliance on his part (or at any rate the effect sought for from his compliance,) the imposition of any such vexation on his part as would present a serious danger of ultimate injustice; and the less the danger from the direct security at the charge of the defendant, the less would be the evil produced by the vexation of counter-security at the charge of the pursuer to prevent him from contributing, through sinister design or negligence, to impose the first-mentioned vexation on the defendant.

But no evil which it is or may be possible to exclude without preponderant evil, should be suffered to pass unheeded or unprovided against, by the legislator, or that of his servant the judge. In their respective accounts with the public, every such individual instance of evil that presents itself will be to be set down under the head of loss: as the cases of most frequent occurrence will be provided for with most care, neither will those of the least frequent occurrence remain neglected; especially since, in whatever part of the field the provident eye of the legislator may have left a pit-fall unclosed, evil-doers, whose eyes will

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by stronger sinister interest naturally be rendered stronger than his, will be at work to widen it.

On this occasion, the antagonizing objects which, in the quality of elements belonging to the calculation in the character of elementary quantities, present a demand for consideration, may be thus stated: —

1. The importance of the service — of the effective service demanded by the pursuer at the charge of the defendant. This will vary, from that of the smallest sum of money which can be the object of demand, to that of the severest suffering to which the law has exposed men, in the hope of keeping excluded the severest evil which man is exposed to suffer from human delinquency. In this element may accordingly be seen included two others — namely, the magnitude of the punishment, and the magnitude of the crime.

2. The magnitude of the vexation to which, for the purpose of preventing the defendant from withdrawing himself from under the burthen, should he be so inclined, it may be necessary to subject him to, while the proof of his being bound to render the service remains as yet incomplete.

3. The magnitude of the inducement by which a person in the circumstances of the pursuer may be led to bear his part in subjecting the defendant to such precautionary vexation in the case in which it is undue, whether it be that the service demanded of him is not due, or that, for preventing him from eluding it, a precaution so burthensome as that which is proposed is needless.

In the case of counter-security against judicial oppression in favour of a defendant, the following are the circumstances by which the magnitude of the provisional or eventual burthen to be imposed on the pursuer for this purpose will require to be governed: —

1. The magnitude of the burthen imposed on the defendant by the direct security — the security for execution.

2. The effective responsibility, satisfactional and punitional, of the pursuer, as far as can be collected from his or her condition in life and pecuniary circumstances, or so far as already notorious or known; or by examination or inquiry directed to the purpose or the occasion in question, ascertainable and ascertained.

Consequently, when on the pursuer's side there are parties more than one, as many different means of counter-security, if circumstances require, may be employed, as there are parties on that side.

In a punishment requiring purely public care, the government advocate being sole pursuer, no means of counter-security can be requisite.

In the case of a punishment requiring publico-private care, as well as in the case where the service demanded is satisfaction merely, without punishment, means of counter-security at the charge of the private pursuer may be requisite.

This quantity is again a compound one: its elements on the one side of the account, the profit expectable from the offence; on the other side, the loss, by the suffering to which by the commission of it, it will appear to him that he will expose himself.

Here then comes in the consideration of the counter-security exigible.

In this counter-security may again be distinguished two branches; one composed of the evil which the law may have attached to the general demand of the ultimate service in question, in the event of its proving groundless; the other, of the evil attached by it to any special demand made of the incidental service, consisting in the exaction of the security for the defendant's compliance, or what is equivalent to it.

The person to whom the responsibility attached to the general demand, on the supposition of its proving ungrounded, will apply, is of course the pursuer. But a person to whom the responsibility attached to the special demand of the extra-security applies, may either be a pursuer or an extraneous witness; for the question as to whether the ultimate service demanded is due, and the question whether the precautionary security antecedent to full proof is necessary, are two perfectly distinct questions: between the sets of facts to which they respectively relate, there may be no connexion whatsoever.

As to the quantity of vexation necessarily attached to the situation in which the defendant must be placed, in order to secure on his part the compliance necessary to the adduction of evidence on both sides, the maximum will in general be comparatively inconsiderable: restraint on his liberty of locomotion during the time necessary for the adduction of the evidence on his side, or the time, at the end of which the pursuer will have adduced the whole of his evidence, or in failure of it, suffered the dismissal of his demand; of these two periods, the longest, whichsoever it may be. But from this restraint, temporary and short-lived as it may be made to be, evil consequences, serious in duration as well as magnitude, to an indefinite degree, may in some cases be included. Of these, lest the general conception formed of them should be inadequate, it may be necessary to bring to view a few examples.

In the view of exhibiting in its greatest possible dimensions the evil liable to be produced by a short-lived restraint on the liberty of locomotion as above, a course that would be apt to present itself is — the placing at the highest point that could reasonably be assumed, the mass of the matter of opulence

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capable of being thus wasted or injuriously transferred. This course would, however, be a delusive one. The greater the quantity thus brought to view as capable of being wasted or ill bestowed, the more rare would be the examples of its being in fact thus dealt with. On the other hand, the magnitude of the evil (in its first stage at least) — the magnitude of the suffering, is not by any means proportioned to the magnitude of the sum which is the instrument of it. Of the suffering produced by a loss, the magnitude is not as the *absolute* amount of the sum lost, but as its *relative* amount, relation being had to the aggregate mass of the property of the loser: to a person the value of whose whole property does not exceed eleven pounds, the loss of ten pounds may produce at least as severe a suffering as to one who has eleven thousand pounds, a loss of ten thousand; while the number of those who are susceptible of a loss of ten pounds is perhaps a hundred times as great as the number of those who are susceptible of a loss of ten thousand pounds, leaving a remainder of not less than one thousand pounds.

Perhaps by no one of those, by whom the functions of legisiation have as yet been exercised, has this only true measure of good and evil, as dependent upon the matter of wealth, received due, if any attention. In his eyes, the sum which, with relation to his own circumstances, is of no importance, is absolutely destitute of importance; what is trifling to himself is, in his view of the matter, trifling in itself. Of this error what is the cause? Answer: Want of sympathy. But of sympathy in this case there are two modifications—sympathy of affection and sympathy of conception; and distinguishable as they are, intimately connected with one another are these two modifications: each is to the other cause and effect. Of that for which a man cares little, his conception is proportionably faint; and concerning that of which his conception is faint, his care is proportionably inconsiderable.

Thus much as to security: now as to counter-security. Proportioned to the danger impending over the condition of the defendant, in respect of the loss and vexation he is liable to be subjected to, by the security exacted of him at his charge as above, is the efficiency requisite to be given to the counter-security, the object of which is to protect him against that danger.

In this case, the eventual suffering, if it be adequate, that is to say, certain of outweighing the profit from the wrong, must be indefinite: in duration, co-extensive with the whole of life; for supposing it limited, though for example to imprisonment for so great a length as twenty-one years, a person who, by rivalry, for example, in trade or marriage, had been rendered an adversary to the defendant — if it were simple imprisonment, might render it worth the while of another who had nothing, to inflict the calamity on the defendant by a mendacious statement of facts, which if true would create an adequate demand for the security: and this, too, even under a full assurance that upon hearing the evidence on both sides, the falsity of the statement would be brought to light, and infliction of the appropriate punishment on the false witness a certain consequence.

By inearceration, continued down to the time at which the truth of the statement has been either proved or disproved, the testifier in question would be eventually subjected to this indispensable punishment, thus seen to be indispensable.

On the other hand, suppose the statement true, the actual suffering might, and naturally would, be confined within narrow limits; and supposing it voluntarily submitted to, as in a state of things frequently exemplified, it might be, the evil would thus by the very supposition be reduced to nothing.

Of all the several modes of affording the requisite counter-security, this is manifestly the most afflictive; and if this be not too afflictive to be employed, still less could any others be.

Thus, then, would stand the case. On the here-proposed plan, no person, for the obtaining of the security, when needless and adverse to justice, would be able to purchase a false testimony; many a person, for the obtaining of the security, where needful and conducive to justice, would be able to purchase true and honest testimony.

By imprisonment, the security may be considered as being in all cases adequate. For the person of the applicant being thus completely at the disposal of the law and the judge, the punishment is, physically speaking, capable of being screwed up in magnitude to the utmost capacity of human sufferance; and thus the evil to which, on the score of eventual punishment, the evil-doer is subjectible, is rendered preponderant over the good of the profit which in any shape it would be possible for him to reap from the evil deed — the sinister design — to whatever degree successful.

§ 3. *Possession-giving security, or pledge-giving security.*

Placing goods in pawn for the purpose of raising money on them, as a security to individuals for the money borrowed on them, is a practice universally notorious, and as universally unobjectionable. In so far as practicable with advantage, not more objectionable should it be when applied to the purposes of justice: on the one hand, to secure defendant against irreparable vexation; on the other hand, to secure to a pursuer a chance which he could not otherwise have, for the obtainment of

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service due to him, in some shape in which it would not otherwise be obtainable.

To be made capable of answering the purpose, the property thus placed at the disposal of the judicatory must be of the moveable sort, and actually forthcoming, and placed within the physical power of the judge. Supposing it an unmoveable subject, the nature and character of the security would be quite different. In the character of a security, the only effect it could have, would be that of attaching invalidity to all succeeding instruments by which it was endeavoured to be transferred to other owners.

Against the acceptance of security in this shape in case of need, no preponderant objection can, it should seem, be opposed. With regard to the sensible evil, the great probability is, that it will not come into existence; for unless on the part of the bondsman certainly, and on the part of the security-giver probably, a persuasion to that effect had place, the security would not be afforded. Moreover, supposing it to come into existence, still it is not so much net suffering produced; for that which is taken from the friend of the wrong-doing pursuer, being given to the defendant, who has been wronged by him, the only net loss experienced by the national stock of happiness is the amount of the difference between the pain of loss and the pleasure of gain produced by the transfer of one and the same instrument of enjoyment.

In the case of bondsmanship, it has already been observed, no confinement of the person is in an immediate way made to have place; but in an unimmediate way, if and in so far as imprisonment for debt has place, it may have place. For in the event of a suit against the bondsman, for the obtainment of the matter of compensation, if either by inability or unwillingness, payment on his part is prevented, whatever be the imprisonment which he could suffer for a debt of his own, the same may he be made to suffer for the debt of him to whom in this way he proved himself a friend.

The course of the judge is thus to be steered between two opposite dangers, like that of the mariner between two rocks: —

1. Danger of leaving in the situation of the applicant an injured man without redress, for want of taking the measures necessary to secure forthcomingness in respect of person and property, for the purpose of giving execution and effect to the law.

2. Danger of oppression to the defendant, by vexation in the shape of imprisonment, loss of property, or evil in any such other shape as by the nature of the case it may happen to him to stand exposed to.

The first observation that presents itself is — that in the case of the applicant's offering himself to be imprisoned, the probability of ulterior evil is in case of acceptance extremely small. The probable case is, that in his opinion the justice of his claim is indubitable; and if so, the instant that, by the examination of the defendant, this appears to be the case, the imprisonment is at an end.

True it is, that as before observed, the claim put in by him may be an unquestionably well-grounded one; yet still, if this be the course pursued for the purpose of giving effect to it, evil to the defendant, evil to an enormous amount, and thence undue, may be the result. Here then comes the case where the appropriate warning will be given to him by the judge: —

"Speak the truth; tell us whether the act of power you call upon us to exercise, would not, to the defendant, be productive of vexation in such or such a shape? (mentioning it.) For take notice, that if it would, your demand will not be granted; and moreover, you may be made effectually responsible to him, to the amount of an equivalent for the vexation thus imposed on him at your instance."

Three rules, however, may perhaps serve him for his guidance: —

Rule 1. Parties on both sides equally sincere: of two evils, reparable and irreparable, choose the reparable.

Rule 2. Party on side — say the pursuer's side — *sincere;* on the defendant's, *insincere:* throw the evil on the insincere defendant, although it should be irreparable, rather than upon the pursuer, though upon his side, as far as appears, it may be reparable. Reason: By compliance with the demand, of the justice of which the defendant is by the supposition conscious, it is in his power to preserve himself from this evil: thus, in fact, it is by himself that the evil is inflicted on himself.

Rule 3. Of the magnitude of the evil, either absolute, in the case of a party on the one side, or comparative, in the case of the parties on both sides, no true conception can in any case be formed, unless the pecuniary circumstances of all parties be taken into the account.

Such as have been seen, are the difficulties and embarrassments which encompass the mind of the legislator whose operations are governed by a real regard for the ends of justice.

English practice knows of no such embarrassment. By English judges, who in relation to this part of the field, as in most others of the field of procedure, have saved the superior authority the labour of legislation, no such embarrassment has been felt. Acting with uncontrouled power in the pursuit of its own ends here as elsewhere, the fraternity have been sitting upon velvet.

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So long as to those ends no counter-security seemed necessary, no counter-security would they give. Till less than a century ago, by any person, almost any other might, on paying of the price fixed to Judge and Co. —the price at which liberty was sold—be cast into prison. When at last, by the oppression and depredation thus committed, an uneasiness was felt to such an amount as to find its way to the ears of a lawyer-led, self-styled and self-seated representation of the people, a counter-security, such as it was, was established, and that security consisted in an oath — an oath, the sole panacea for so large a portion of the maladies introduced into the body politic by the hands of lawyers — the ceremony called an oath, no matter by whom, any more than under what circumstances, nor to what ends, performed.

Of this nostrum, the insufficiency to all good purposes, in whatever form it has ever been administered, is shown elsewhere. What belongs to the present occasion is the observation, that in this quack medicine consists the whole of the counter-security afforded, on an occasion for which the need of an effectual counter-security is so urgent as it has been seen to be.

Should a man say, "Should my friend fail to do what is required at his hands, take me; commit me to prison, and keep me there, till he does." For the acceptance of no such offer would he find a door left open anywhere by judicial practice; that is to say, in an immediate way, for in an unimmediate way it has been left open with but too much effect.

In this case, then, the only sort of security that is given, is that which is given by self-subjection to collateral responsibility in a compensational shape.

This, however, does not amount to that mode of security which has just been designated by the appellation of the pledge-giving mode. Of an eventual debt the existence is indeed recognized; but of the money due by this debt, the eventual obtainment is left to the same decision, as it would be in the case of the applicant, if no such security as that which is here in question were afforded by him.

Blackstone in hand,—"By the law of this country," exclaims the panegyrist, "no man can be deprived of his liberty, though it be but for a moment, without a charge on oath for his security!" A charge? A charge for which, be it ever so utterly and knowingly false, he by whom it is made, has not in one instance out of many a hundred, not to say thousand, anything to fear!—nothing at all, if either he be too poor or too loosely connected with the territory, to be worth prosecuting; or the victim be too poor to prosecute, or not vindictive enough, and at the same time rich enough, to tax himself to an indefinite amount, for the chance of sending off his injurer to a settlement which perhaps it is his wish to repair to. An oath?—a ceremony which all merchants,* compelled to it by all parliaments, and which all good men and true, instigated by the example of all self-attested receivers of the Holy Ghost, and the frequently repeated instigation or approbation of all judges, are in the face of those same judges continually treading under foot, with conscience in their mouths — a ceremony which enables every petty tyrant, on pretence of preserving the peace, with full assurance of impunity to do with the helpless, that is to say, with nine-tenths of the community, what he pleases.

CHAPTER XX.

REMEDIES, — COMPENSATION.

§ 1. *Degrees in the scale of affluence, how measured for the purposes of compensation and punishment.*

OF a person's place in the scale of affluence, the altitude will be as the amount of his money and his money's worth, directly; or the amount of his pecuniary burthen, and quasi-pecuniary burthens, inversely.

Accordingly, no assessment ought to be grounded on the consideration of his means exclusively: none without taking into the account the amount of burthens as above.

In the account of *means*, or say *assets*, due regard will be paid to the difference between income derived otherwise than from capital, and income derived from capital.

In the account of burthens will be comprised the expense of maintenance, afforded by the party to such dependents as belong to him, deduction made of such earnings, if any, as they are in the habit of making. Of such dependents, examples are the following:—

1. In the case of a married man, his wife.
2. His children, such of them as are under age and unemancipated.
3. Any helpless grand-parent, or other progenitor or progenitors, male or female, with whose maintenance he is obligatorily or habitually charged.

In and for the purpose of assessment made of a mulct imposed, the judge will proceed on conjecture — or say, *vexation-saving* estimate. In so doing, after putting such questions as to him shall appear appropriate, concerning the station occupied by the party in the scale of affluence, stating his means of subsistence as derived from ordinary day-labour, handicraftship, art, profit-seeking profession, or property — stating it at so much per year, or so much per week, — he will there-

* A large mass of these oaths has been abolished by a recent statute. See Note prefixed to "*Swear not at all*," in this collection.—ED.

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upon state the amount of the mulct, declaring at the same time its ratio to the amount of his annual income.

Tables constructed for this purpose, to save time and labour in calculation, will be kept hung up in the judicatory, and form part and parcel of the furniture thereof.

The judge will declare, that from such data as have come to his observation, this is the nearest estimate which he is capable of making.

Antecedently to this declaration, he will have elicited from the examination the amount of the pecuniary burthen. In the ordinary case of a person unmarried, this amount being equal to 0, a word or two will be sufficient for the probation of it. In the case of a female, small is the number of words which in general will suffice.

If, upon hearing the amount of the mulcts (regarding the estimate as excessive,) the mulctee chooses rather to undergo examination for the proof of the correct amount of his means of payment, than pay it or stand bound to pay it, he will declare as much, and the judge will proceed to take his examination accordingly.

Divers circumstances will be apt to concur in preventing an estimate thus taken from being so correct as could be wished. But they are inherent in the nature of the case; and the inability to reach the highest point in the scale of exactness is no reason for omitting to make the nearest approach to it which is consistent with the avoidance of preponderant evil from the same cause.

1. In regard to means. A person who, being attached to this or that profession, derives not from it, as yet, any quantity of emolument which does not to any degree fall short of that which is ascribed to him by the vexation-saving estimate, submits to a mulct which is in truth excessive, to save that humiliation and prejudice to his professional reputation which would be the natural result of the disclosure.

2. In regard to burthens. What may happen is, that a burthen bearing any proportion to his means, may be produced by the obligation, legal or moral, of affording maintenance to the offspring of an unlawful intercourse, or to a person with whom such intercourse is or has been maintained.

§ 2. *Costs the grand instrument of mischief in English practice.*

When, through the instrumentality of an English judicatory, depredation and oppression are committed, costs are in such cases the capital instrument. No complaint so frivolous, but that, with the help of this instrument, the ruin of any one of the vast majority of the actual population may to a certainty be accomplished; and to every one who will make this use of it, a perpetual, and that an ample reward, is continually held out.

By some trifling imputation cast on his reputation by Nokes, a correspondently trifling injury is sustained by Stiles. Under natural procedure, at the first and only interview of the parties before the judge, the matter would be settled between them: Nokes receiving under the hand of Stiles an acknowledgment of the misrepresentation, with expressions of regret for the having given utterance to it, and an ample compensation for the two days of Nokes's time consumed in the application for redress; one, by the application made to the judicatory for the mandate requiring the attendance of Stiles, the other by attendance paid by Nokes in consequence: fees to judge or judge's subordinates, none; fees to advocate or attorney, none: no such assistance being of the least use.

So much for natural procedure. How stands the matter with technical procedure? The suit carried on in the usual manner, at the usual expense; and the misrepresentation being proved, the frivolousness of it at the same time made manifest, the judge informs the jury that they are bound to find for the defendant, but that the damages are at their option, and that the sum appointed to be paid on that score may be as small as they please.

The damages they accordingly assess at a farthing. Defendant triumphs: but the triumph is a dear-bought one. Behind this farthing lies a sum of from £50 to £300 in the name of costs, sadly contrary to the expectation of the unhappy Pyrrhus by whom this triumph has been enjoyed. If he has no more than a moderate share of business, whatever his employment may be, another such triumph is not necessary to the accomplishment of his ruin: the single one is sufficient, when, to his own costs, those of his adversary's are also added.

Who set the plaintiff to work? The attorney: for out of these two or three hundred pounds the attorney pockets no inconsiderable share. Thereupon comes the usual outcry against attorneys— "O, what sad wicked men are these attorneys!"

But who set the attorneys to work? The judges and the House-of-Commons lawyers. By whom else was the system of depredation created and preserved? By the judges was it not created?—by the lawyers in both Houses, their descendants and others linked together by the ties of the same sinister interest, preserved: preserved in a negative way, by care taken never to introduce any measure that can operate as a remedy, completely obvious as is the remedy: positively preserved by standing up, and being known to be in constant readiness to stand up, to oppose with all the zeal that interest and interest-begotten

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prejudice can inspire, whatsoever proposed remedy shall bear on the face of it any promise of being productive of that effect.

Is not a reward — a real reward, thus perpetually held out by them to everybody who will be instrumental in the production of the evil abovementioned? Where is the villany in the profit of which they do not look to be sharers? — where is the villany — so long as, instead of punishment, it is reward that they reap from it — they are not at all times ready to do their utmost to render triumphant?

Yet while these men reap the greater part of the profit, and by their tongues contribute might and main to the success of it, the attorneys, who are but the machines for conveying the mischievous matter to their lair — the attorneys, whose share in the production of the mischief is in comparison as nothing — on the attorneys do the people, the silly and unreflecting people, cast all the blame. Thus comes an ex-chancellor, Lord Redesdale (by whose incapacity the unhappy people of Ireland were so long afflicted,) and, as if his own practice had not taught him so completely the contrary, observes the popular delusion, takes advantage of it, and by his false certificates assists in casting on that comparatively innocent branch of the profession all the blame.

By whom was this system of depredation and oppression invented and organized? Was it by the attorney, any part of it? No, but by the judges — the whole of it — the judges, with their partners and accomplices in both Houses for their protection and support.

§ 3. *Burthen of costs minimized.*

Fundamental rule: — Antecedently to the decision as to the question whether any party is in the wrong, and if yes, who, and in what way, and to what extent in the wrong, — to the government, at the charge of the people, for the benefit of the people, in their eventual capacity of suitors, it belongs to take upon itself the burthen of costs, even though from its so doing the aggregate amount should in some degree receive increase. But this will not be found to be the case.

After minimizing the burthen, in so far as it cannot but rest on the parties, one or more of them, the endeavour of the legislator will be to fix it upon each party, in amount bearing a proportion to the degree in which he is in the wrong (or say, to blame, or blameworthy,) regard being had to the distinction between blamelessness, rashness, and evil consciousness.

By the burthen, is here meant the painful sensation, not the pecuniary amount of the loss by which that sensation was produced. For in so far as the location of the burthen has for its object, effect, and tendency, the prevention of future similar wrongs, it is by this sensation, and not by the quantum of the matter of wealth, that the effect produced will be proportioned.

When as between a party on one side and a party on the other side, pecuniary circumstances are to a considerable degree unequal, it follows, that to render the pressure of the burthen equal, it is necessary that the pecuniary burthen should be assessed in a larger proportion on the richer, than on the less rich: that proportion being directly in the ratio of the quantum of the matter of wealth possessed by them respectively.

Here, then, is a case in which, on an account different from that of blame, the pecuniary burthen of costs may be, and ought to be, assessed upon a party, namely, the magnitude, absolute and relative, of the net quantity of wealth in his possession, or at his command.

In this mode of assessment there is nothing anomalous with relation to the other part of the system of government. The object — the declared object at least, of those who have the management of the public expenditure, is to maximize the equality, to minimize the inequality, of the pressure produced by the correspondent taxes: no reason can be assigned why the repartition of the sensible burthen should in this case be determined by principles different from those by which it is determined in those other cases.

Efficient and justificative causes of subjection to indemnificational obligation, in respect of costs of litigation, are the following: —

1. On the part of the obligee, criminality by evil consciousness.

2. On the part of the obligee, culpability by rashness or heedlessness.

3. On the part of the obligee, superiority in the scale of opulence, relation had to the position of the adverse party in that same scale.

Parties with relation to one another are — 1. Adversaries; 2. Associated allies.

Considered with a view to eventual reimbursement at the charge of an adverse party, costs, say *litigational costs*, require to be distinguished into — 1. *Ante*-contestational, or say, *pro*-contestational; and 2. Contestational.

By ante-contestational, understand such as have been incurred by a party, whether on the pursuer's side or on the defendant's side: on the pursuer's side, before he has been constituted such; on the defendant's side, before he has been constituted such.

Exceptions excepted, for reimbursement of contestational costs, indemnificational obligation will not be imposed in any case, without antecedent allowance and authorization of the expenditure, by a mandate of the judge. To a mandate to this effect, give the denomination of a *litigational-disbursement-authorization mandate.*

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As a ground for the issuing of a litigational disbursement-authorization mandate, the judge confronts with one another, the two quantities, to wit —

1. The quantity of suffering in the shape of pecuniary *loss*, and other shapes, likely to ensue to the party in question, for want of the disbursement, on the supposition of its not receiving authorization, and thus resting on the shoulders of the disbursing party.

2. The quantity of suffering likely to be produced in the breast of the party on the opposite side, in the event of the burthen being removed to his shoulders, from those of the party or parties on the other side.

In respect of contestational costs, indemnificational obligation will not be imposed, unless pre-authorization for the disbursement has been given by the judge; for if it were, the power of taxation, at the charge of one party, would thereby be given to the other. That to any party, whether in the right or not in the right, no power should be given exercisable at the charge of a party not in the wrong, is manifest.

Nor yet without modification should it be given at the charge of a party who is in the wrong. For in this case, excess to an unlimited amount might thus be given to the burthen so imposed; and beyond what is proper, on the joint consideration of satisfaction and subsequent punishment, whatsoever quantity of money is thus exacted, will be wrongfully exacted: the act is an act of oppression.

In proportion to a man's altitude in the scale of opulence, will be the danger of his falling into transgression in this shape: for in that same proportion is his ability to make the sacrifice necessary.

Of all these transferences, remains the most important, which is the transference of so large a portion of the at present customary mass of judicial operations, from professional hands paid by the party, to the official hands paid by the public; all danger of abuse, from quantum and increase of private profit, being obviated as above.

Immediately or unimmediately — without or with the intervention of other minds one or more — in the judge's mind must have been presented all the objects, by the contemplation of which his decrees have been determined. Behold now the effects, in so far as an intervention of this sort has place. Good in no shape; evil in a variety of shapes: evil even when the assistant employed is of the gratuitous class; evil incomparably greater when he is of the mercenary class.

In the first place, take the case where the evidence on which the fate of the suit depends, is all of it of the nature of personal and orally-delivered evidence: after that, the case in which ready-written or real evidence is substituted or added.

First, suppose the substitute a gratuitous assistant. Note, then, on this occasion, the principal is that one of the two to whom the facts of the case are exclusively or mostly known: this being the ordinary case. In so far as it is to the substitute that they are best known, these evils will have no place: —

Evil 1. Augmentation, doubling at least the quantity of time consumed: instead of the party stating the case at once to the judge, the party has to state it to his substitute, and then the substitute to the judge. Be its amount what it may, this evil is a certain one, being inseparable from the nature of the case.

Evil 2. Misrepresentation applicable to every part of the whole quantity of matter of fact, which the claim on the pursuer's side has for its ground: misrepresentation by the substitute, with correspondent danger of deception and misdecision on the part of the judge.

How infinite the diversity is, which this evil admits of, is sufficiently obvious: endless would be the task of an endeavour to delineate it.

Evil 3. On the part of the substitute, incapacity of securing attendance and narration of such evidence as the supposed percipient witness has it in his power to afford: under no obligation is this witness to afford information to any person other than the judge.

Evil 4. Probable incompleteness and undue partiality of the mass of evidence.

In this state of things, evidence not being obtainable from any witness who is not willing to furnish it — to furnish it in the first place to the applicant, and thence eventually and probably in the judicatory to the judge, at the price of the vexation inseparable from the operation, — an exclusion is thus put upon the evidence of all witnesses who are not more or less partial witnesses.

True it is, that the party himself has no more power than his gratuitous substitute to discover or secure the delivery of reluctant evidence. But for the obtaining it from the authority of the judge, such evidence as the nature of the case happens to afford, he has a much better chance, when stating the case to the judge immediately, than he can have when the judge receives it no otherwise than at second-hand, subject to the danger of omission or misrepresentation, however unintentional on the part of the substitute as above.

Now suppose the substitute a mercenary assistant.

Infinite is the augmentation which the evil receives in this case.

Engaged by sympathy, the gratuitous substitute has no interest different from that of the principal, for whom he is content to subject himself to the mass of vexation inseparable from such business.

Opposite to that of his client (for such, in

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this case, is the name given to the principal) opposite in every point, is the interest of the mercenary assistant.

Opposite in respect of the collateral ends of justice: for out of, and proportioned to, the delay, vexation, and expense to which the suit gives birth, are his profits.

Opposite even in respect of the main end of justice, rectitude of decision, — avoidance of misdecision, with execution and effect accordant. For out of misdecision in the suit in question, may arise an appeal, or a new and independent suit.

Obvious indeed is the check opposed to this sinister interest, by regard to reputation; upon which another obvious supposition is, that quantity of business will depend. But the more closely the nature of the case is looked into, the more feeble and inadequate will this check be seen to be. Of this inadequacy the view will be the clearer, when the force of the sinister interest is taken into consideration.

§ 4. *Parties wronged preserved from ridicule.*

An effectual security for appropriate aptitude on the part of the judge, as well as all other public functionaries, is the light of publicity kept directed upon all judicial operations, in all cases except the comparatively small number in which, by reason of this or that special cause, an adequate demand for temporary privacy, or say secresy, has place.

Of this publicity, one effectual mean is liberty to all persons without exception to take notes of everything that passes in the justice-chamber; and to the report founded thereon, to give whatsoever mode and degree of publicity the person in question is able and willing to give to it.

Of the instruction thus derived, the utility will depend upon and be in proportion to the clearness, correctness, and comprehensiveness, as also the exact relevancy, of the matter to which publicity is so given. The end and purpose of it will be counteracted by every lot of surplusage, that is to say, of irrelevant matter, however in other respects innoxious.

But it will be counteracted in a universal degree, and evil opposite to the ends of justice produced, if in the account so published, mention be made of any matter, the effect or tendency of which is to bring down ridicule upon an injured individual, by whom, at the hands of the judge, relief from the burthen of the wrong is sought, insomuch that the injured suitor obtains in the chamber of justice, along with relief from wrong, an addition to, and aggravation of it.

For the prevention of evil in this shape, every judge will, in his judicatory, keep an attentive eye on whatever reports happen to be given of the proceedings in his judicatory, by the public prints.

At the instance of the party wronged, or even of his own motion, he will place to the account of defamation, and consider as a species of the offence so designated, any published discourse, any part of which has for its object the producing mirth at the expense of a person wronged, on the occasion of the application made by him for redress at the hands of the judge: calling forth mirth at his expense, and thereby inflicting on him the species of mental vexation, the production of which is among the results of ridicule.

§ 5. *Female delicacy, how preserved from injury.*

In a certain class of cases, by the course of the discussion, unless the arrangements necessary for prevention be established, the sensibilities peculiar to the female sex will be liable to be wounded, and the suffering produced by wrong will thereby, instead of remedy, be liable to receive aggravation. To put exclusion upon evil in this shape, will be among the objects of the judge's care.

To give, on any occasion, in comparison with the great majority of the people, any preference to those classes which are nursed in the lap of prosperity, would be inconsistent with the greatest happiness principle, and thereby with the spirit and endeavour of the present code. More congenial to that principle — more conducive to equality — would be the opposite course.

But by the culture given by superior education to the human mind, sensibility is on various occasions increased: insomuch, that although from exhibitions and discourses by which, in the mind of a person in a situation in life, occupying a low degree in the scale of education, no suffering would be produced: yet suffering in a considerable degree acute might be produced in the mind of a person occupying a high elevation in that same scale.

§ 6. *Vexation by cheapness of appeal obviated.*

Of appeal, correspondent delay is an indispensable concomitant. Delay has the effect of injustice while it lasts. To all persons whose condition is in any way deteriorated by delay, it has vexation for its concomitant. Evil in this, as in all other shapes, it will be the business of the law to minimize. To throw needless difficulties in the way of appeal, and in particular, to load this remedy with factitious expense, or to omit any means of disburthening it of this obstacle without preponderant evil, would in this stage operate as a denial of justice, as in the immediate stage. On the other hand, as by cheapness in the initiative stage of juridical proceedings, evils would be produced if not accompanied with measures of repression for the restriction of groundless or injurious ones, so will it of

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necessity be in the terminative stage. To the prevention of evil in this shape, the following arrangements are directed: —

In a penal suit, if in the opinion of the judge appellate, the appeal was groundless, and to such a degree groundless, that in the mind of the appellant it cannot reasonably be supposed to have been otherwise, power to the judge appellate to add to any punishment susceptible of gradation, which constitutes the whole or a part of the allotted punishment (burthen of compensation included,) any portion not exceeding (one tenth) or (one fifth) of the punishment appointed by the judge immediate.

On the appellant, if the original decree be not reversed or modified, will fall, of course, the burthen of compensation as to all costs imposed by the appeal upon the party or parties on the other side, as well as those imposed upon such party or parties on the same side, if any, as did not join in it.

Power to the judge, in consideration of the pecuniary circumstances of the parties on both or all sides, to reduce this same burthen of compensation in such manner as to him shall seem meet, stating, at the same time, the consideration on which such reduction has been grounded.

To this head belong the arrangements by which, in the sort of case above mentioned, the appeal-warranting function is given to the quasi-jury.

Power to the government advocate, in case of a groundless demand by either party for a recapitulatory trial before a quasi-jury, to demand the imposition of a mulct, on the ground of the damage to the public by the useless consumption of the time of the judicatory.

CHAPTER XXI.

JUDICIAL TRANSFER.

§ 1. *Mode of transfer.*

WHEN, for the purpose of causing the defensive statement of a defendant to be received, or his testimony to be elicited, the judge of the originative judicatory proposes to transfer this operation to the judge of another judicatory, the mode of proceeding is as follows: —

1. By the appropriate mode of conveyance, the judge of the originative judicatory transmits to the judge of the proposed transfer-receiving judicatory, a missive, having for its principal purpose the causing him to fix a day, on which the defendant in question shall, by accersition, or prehension and adduction, as the case may require, be called upon, or made to attend, at such proposed transfer-receiving judicatory. Name of such missive, — Co-operative-hearing-proposing missive.

2. For the information of the proposed transfer-receiving judge, with this missive will be inclosed an exemplar of the record on which has been entered the minutes of the proceedings in the originative judicatory, down to that time.

3. To every party whose demand-paper, or defence-paper, has been received — as also to the defendant or proposed defendant, whose defensive statement or testimony is proposed to be elicited, at the proposed transfer-receiving judicatory, another exemplar will also be delivered or transmitted: or, in case of extra-numerousness, a certain number of exemplars will be sent, for the purpose of their serving, each of them, for the use of a certain number of the parties on that side, their names being accordingly mentioned.

The form of the missive is as follows: —

To the Judge of the Immediate Judicatory R, the Judge of the Immediate Judicatory S, with brotherly regard.

BROWN *against* WHITE.

It being understood that the defendant White has a habitation on your territory, this is to request you to name a day for the hearing of the said proposed defendant, and receiving his defence-paper, and if need be, examining him in relation thereunto, or eliciting his testimony, confessional and self-disserving, and performing any such other operation in relation to the suit, as the justice of the case may be found to require.

For this purpose I herewith inclose No. 1, containing the record of the proceedings down to this day.

When his defensive statement, with his examination relative thereto, if necessary, is made, be pleased to remit to me [ ] exemplars of the record of the judicial operations performed in your judicatory, together with any such judicial instruments as may, on that occasion, have been exhibited.

If, to the judge addressing, it appears that in the judicatory of the judge addressed, the suit may be more conveniently continued and terminated, or continued until a purpose therein named has been accomplished, or found unaccomplishable, in this case he will say, *Be pleased to take cognizance of the suit, and continue it until, &c.; or until by compliance or execution it is concluded.*

§ 2. *Testifying witness, how procurable.*

If for the purpose of examination, to be performed on an extraneous witness, or on a party on either side, the originating judge refers the matter to a co-judicatory, he will transmit to the co-judicatory, for the information of the judge and all parties interested, an exemplar of the record of all proceedings in the suit down to that time.

So likewise he will at the same time transmit to the judge a letter informing him of the address of all who have appeared in per-

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son, or by proxy, as parties at his judicatory, for the purpose of their being accersed to the co-judicatory as occasion may require.

At the same time he will give his opinion as to the question, at which of the two judicatories the suit may, in the manner most conducive to the ends of justice, be further proceeded upon, and finally determined.

In case of disagreement, the judge of the original judicatory may, upon his responsibility, persevere in retaining cognizance of the suit until the termination thereof.

In this case, a party whose desire it is that the examination be taken in the post-originative judicatory may, upon his responsibility as to costs, appeal as to the point, to the appellate judicatory — to wit, to that appellate judicatory within the territory of which the territory of the originating judicatory is situated. But notwithstanding such appeal, the judge of the originating judicatory may persevere in proceeding, if, on a determinate account mentioned by him, such perseverance be necessary to the prevention of irreparable damage.

JUDGE'S INTERCOMMUNITY-EXERCISING-MANDATE-ANNOUNCING MISSIVE.

To the Judge immediate of Wootton sub-district, the immediate Judge of Hilton sub-district, with fraternal regard.

BROWN *against* WHITE.

1st *Jan.* 18

Herewith I inclose an exemplar of a prehension-requiring mandate, directed to my prehensor John Holdfast, to be eventually executed in your territory.

CHAPTER XXII.

PREHENSION.

§ 1. *Subject-matter.*

PREHENSION, applied to things, will be with reference to —

1. A thing immoveable; as a house, or portion of land.

2. A thing moveable; as a horse, a cart, a bed, a painting or other product of the fine arts.

3. A stock of things moveable; such as the whole or any part of a man's agricultural stock, or trading stock.

In each of these cases, it may be to be prehended, with or without things which in relation to it are termed *appurtenances*, as being in use with it.

In each case, the prehension-mandate will contain the instruction requisite for distinguishing the *prehendendum*, and prescribe the disposition to be made of it.

§ 2. *Purposes.*

It may be, that either the existence of the subject-matter of the proposed prehension, or the place in which it is lodged, is to the judge a matter of doubt. In so far as this is the case, search for it is necessary to be made.

Of the purposes for which search may be made, examples are the following: —

I. As to persons.

1. A person whose forthcomingness is desired in the character of a defendant.

2. A person whose forthcomingness is desired in the character of a witness.

3. A person in relation to whom a suspicion is entertained, that he or she is illegally detained against his or her will; or though it be not against his will, if within age of lawful consent, by reason of infirmity of mind or body unable to give valid consent.

4. A person in relation to whom a suspicion has place, that although not illegally detained, he or she is kept in a state of undue seclusion.

II. As to things moveable

1. A thing in relation to which a suspicion has place, that it has been the subject-matter of delinquency: for example, in the shape of theft, or embezzlement, or wrongous deterioration.

2. Or that, in relation to delinquency in any shape, or right in any shape, it would serve as a source of written or real evidence.

3. A navigable vessel, or vehicle, in relation to which a suspicion has place, that on search it would be found to be a receptacle containing any such subject-matter of delinquency, or source of evidence, as above.

III. As to things immoveable.

1. A piece of ground, or building, for example, in relation to which, a suspicion has place, that on search it would, in some part of it, serve as a source of real evidence.

2. A piece of ground, or building, for example, in relation to which a suspicion has place, that on search therein would be found some moveable thing which has been the subject-matter of delinquency, as above; or a thing which would, as above, serve as a source of written or real evidence.

§ 3. *Prehension applied to persons.*

Antecedently to the definitive decree, by necessity alone is arrestation of the person justifiable, or permitted.

The cases in which arrestation is ordained or permitted are those in which, but for the security thus afforded, a preponderant probability has place, that the giving execution and effect to the ordinances of the substantive law which are in question, would not be practicable.

Arrestation may have place for any of the purposes following: —

1. Punishment: in the case in which, in virtue of a judicial decree, a person having been sentenced to be subjected to corporal punishment in any shape, he not being in the

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power of the judicatory at the time, to subject him to the obligation imposed upon him by his sentence, the performance of this operation is necessary.

2. Stoppage of mischief, or say mischief-stopping.

3. Securing forthcomingness for justiciability; *i. e.* the being in an effectual manner subjected to such obligation as in the case in question the law may require the person of the party to be subjected to.

4. Securing forthcomingness on his part, for the purpose of evidence, or say of testification, for the purpose of his being subjected to interrogation in the character of a relating witness.

5. Reception after escape.

§ 4. *Conditions necessary to justify the issuing of a warrant of arrestation.*

On the part of him, who for the purpose of securing payment for debt, or the performance of any other service beneficial to himself, at the hands of the individual proposed to be arrested, requires arrestation to be made of any person by a warrant from the judge, a judicial declaration in writing to the following effect is necessary: —

I, A. P. do solemnly and judicially declare as follows: —

1. A. D., in virtue of stands bound to render to me a certain service, the value of which, over and above that of any service claimed by him at my hands, is not less than [ ].

2. It is my sincere apprehension and belief, that unless without delay his person be arrested, and placed at the disposition of this or some other judicatory, he will, by withdrawing his person or property, or both, out of the reach of this or any other judicatory belonging to this State, effectually, in the whole or in part, evade the performance of the aforesaid service.

3. I acknowledge myself informed, that in the event of my being convicted of wilful falsehood or culpable rashness in respect of this my declaration, I shall, by the sentence of the law, be compelled to make full compensation to the individual thus injured by me, as also to undergo such ulterior punishment under the name of punishment as the law ordains; and in the event of my not being able to render such compensation, to undergo any such punishment as in lieu thereof the law has provided.

4. Moreover, that whatever may be the value of any service really due to me at the hands of the aforesaid A. D., still, if for the belief, that the arrestation hereby prayed for is necessary to prevent such evasion as above, there be not seen sufficient ground, I stand exposed to the burthen of compensasation or punishment, or both, as the case may be.

In case of mere rashness, the burthen will not go beyond the full amount of compensation; in case of wilful falsehood, punishment added to the above burthen will be severe.

§ 5. *Of seizure, viz. of property, moveable or immoveable.*

Seizure of things, moveable or immoveable, may have place for any one of the purposes following, viz. —

1. Punishment, viz. of the individual whose property is seized.

2. Stoppage of mischief; the property in question being either a subject-matter, or an instrument of the mischief.

3. Securing forthcomingness for justiciability.

4. Securing forthcomingness for testification; that is to say, for the exhibition of circumstantial evidence.

CHAPTER XXIII.

JURY-TRIAL.

§ 1. *Jury in general.*

ENGLISH law, being the only source from whence, in any other country, any conception relative to the institution thus denominated is commonly deduced, — from this same body of law it is, that any explanation given in relation to it must be deduced. This, then, is the standard of reference which, whether any express reference be made to it or no, must hereinafter be continually borne in mind.

Taken in its most extensive sense, a jury*

* By the denomination *jury*, thus employed, no distinctive intimation is afforded of any of the purposes for which the body of the men thus denominated are employed, or of the class from which they are selected. By a jury, in the original signification of the word, is meant neither more nor less than a body of persons, by whom the ceremony of an oath has been performed. But on occasions out of number, by persons of different classes out of number, separately and collectively, the performance of the ceremony of an oath is, under the English law, likewise performed: in a word, to offices in general, not to speak of unofficial persons and occasions, generally speaking. In the character of an obligation, imposing restraint upon the effects of sinister interest in any shape, nothing can be more generally and completely futile. But the ceremony has two effects, which, under the system of misrule, may, to those who profit by it, be with propriety termed advantageous: one is, the causing a functionary (to whose misdeeds there is in fact no restraint except the will of those his superiors in power, whose sinister interest is linked with his,) whose wish it is to do a thing without being thought willing to do it, to appear forced to do it; the other is, when his wish is not to do it, without being thought willing to escape from doing it, to appear forced to forbear from doing it.

George III. finding three or four millions of his subjects in a state of most abject servitude,

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may be defined an occasional body of non-professional and non-official judges, employed to constitute and apply a check to the power of a professional or official judge, or body of judges.

Juries may be distinguished, in the first place, into juries employed for general purposes, and juries employed for particular purposes.

The cases in which juries are employed for particular and comparatively limited purposes, are scattered over the field of English procedure in too great variety to admit of enumeration here.

Juries employed for general purposes may be distinguished into petit juries and grand juries: petit juries again into common juries and special juries. Jurymen are the set of men by whom, in conjunction with the judge, to the end that execution and effect may be given to the laws, application is made of those same laws to the several individual cases which come before them. By what sort of men ought this application to be made? — By what, but by those on whose will it depends by what hands those same laws shall be made.

In any, and in what cases, ought a jury to be employed? Of the sort of body thus denominated, the main use is to apply a check to the power of the permanent judge, or body of judges: that power which, bating appeal, would, but for such a check, be arbitrary.

For whatsoever advantages are derived or derivable from this appendage, not inconsiderable is the price paid in the shape of disadvantage. Only, therefore, in case of necessity — only in proportion to the necessity, should employment be given to it.

1. Evil effect the first, complication.

2. Diminution made of responsibility at the bar of public opinion on the part of the judge.

3. At the charge of the individuals employed in this character, vexation, by reason of attendance; or, at the charge of the public or individuals, benefit in the shape of money, or some other shape to compensate for it.

4. At the charge of the suitors, increase given to delay, vexation, and expense of procedure.

In another work,* where punishment was the subject, the five cases in which the application of it was unapt, were brought to view: where it is groundless — where it is useless — where it is needless — where it is inefficacious — where it is too expensive. Where the subject is this appendage to the judgment seat, those same cases may help to serve for guidance.

Appeal out of the question, by how much soever too expensive, scarcely in any case could this appendage be justly said to be useless, needless, or inefficacious.

But let the public be a good one — as good as, by the help of such arrangements as the above, it might be made everywhere, and the road to appeal as easy as it might be made, appeal will, in the great majority of cases, suffice to render it needless: especially if into the judicatory of appeal this appendage be introduced.

Where neither party sees any such ground of complaint as affords hope of redress, appeal will not be made. Thus, for the reasons given elsewhere, it will be, in the great majority of cases — suppose in nineteen out of twenty. Place no jury-box in the judicatory below; place one in the judicatory above: here, by one appeal, you save nineteen juries.

Thus much as to non-penal causes.

With little variation, the same observations will be found to apply with equal propriety to such penal causes as receive that shape and denomination, for no other reason than the want of an individual party, to whom compensation can be made.

Cases where it is needless: —

In a case between individual and individual, if both parties are as well or better satisfied without it as with it, it is needless — it is worse than useless; the evil effects attached to it stand all uncompensated. Of the whole amount of the additiou made by this appendage, to the expense of judicature, the effect is that of a tax upon justice: of this tax, at the charge of those who are unable to pay it, the effect is that of a prohibition. Of this prohibition the effect is, in the cases in question, a denial of justice.

In the great majority of non-penal suits instituted, there exists not any dispute: the need of judicature is on the part of the plaintiff; his demand is well grounded: on the part of the defendant, inability or backwardness has been the sole cause of non-compliance. By the extra expense attached to procedure, by the jury, inability is not removed or lessened, but increased: to the surmounting of whatsoever backwardness may have place, this instrument of complication affords not assistance, but obstruction.

Even where the cause of dispute, and dispute accordingly, has existence, the great majority of the number of individual cases are of the most simple nature: if the parties were present, from ten to thirty minutes would serve as effectually for discussion, as the same number of years would.

To the greater number of cases individually taken, rather than to the lesser, should the

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was of course averse to the seeing them rise to a level with the rest. An oath, called a coronation oath, framed for the manifest purpose of producing the appearance without the effect of an obligation, served him for a pretence.

* See *Rationale of Punishment*, and *Rationale of Reward*.

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system of procedure be in the first instance adapted.

Causes made penal by reason of aggravation stand upon a footing widely different.

In a non-penal case between individual and individual, generally speaking, it is only by accident, and that a rare one, that the judge will stand exposed to the temptations offered by particular and sinister interest: from the magnitude of this danger, defalcation may be made by arrangements having for their object the excluding functionaries of this class from serving in districts in which they have connexions.

Not so in criminal causes.

In the most important portion of these causes, viz. that in which the alleged crime belongs to the field of constitutional law — where, in a word, the rulers as such, in addition to their share in the universal interest, possess a particular interest, — the judge who, as such, would never fail to possess (to an amount more or less considerable) interest, adds to the ostensible situation of a judge, the real character of a party, viz. on the plaintiff's side of the cause. In these cases, nothing therefore that can contribute to the establishment of a counter-force, capable of applying an effectual check to the force of this temptation, can be either needless or superfluous. The power of a jury presents the only counter-force applicable to this purpose.

In another class of cases, though the demand for a jury is not quite so strong, it is too strong to be resisted. The offences belonging to it may for this purpose be denominated offences through indigence, or the offences of the indigent; theft, fraudulent obtainment, robbery, *i. e.* forcible depredation, may serve for examples. In the suppression of offences of this class, men of all ranks have, it is true, one common interest. But in proportion as the sympathy a man feels for individuals belonging to the class in which offenders of this description are most apt to be found, is faint, the check applied by this social, to the self-regarding spring of action, is weak; and the anxiety to reach the guilty predominates over the inclination to avoid striking the innocent. The indifference with which a judge habituated to the trial of causes of this description, views the conviction and death of a defendant, guilty or innocent, might be represented by the indifference with which a butcher contemplates the slaughter of a lamb, for the carcase of which he is paid — were it not for the delight, which the judge, hating and hated by the class by which his victims areafforded, extracts from the contemplation of their misery. A citizen of London will not be at a loss for an example.*

By the same causes by which a judge will be led to regard on this occasion, with less than due sympathy, the interests of those classes which he sees lying under his feet,— by these same causes will he be led to regard with more than due sympathy those interests upon the same level with his own, or above it. In England, seeing a judge guilty, as such, of a crime of any degree, from the lowest to the highest, you are determined he shall be punished, — you must murder him, for there are no other means possible: if your wish is to see yourself punished, accuse him of it: you will not miss your mark.

Of the cases treated on the footing of criminal cases, another division which may be mentioned on this occasion, is that of the offences against the revenue. For an offence of this description, neither himself nor any particular connexion of his, will the judge be in much danger of becoming the subject of prosecution. Of the class to which he belongs, and by the sympathy with which he is engrossed, it is the interest that the mass of wealth extracted from the labour of the labouring classes be as great as possible: the greater it is, the more there is of it to enrich them, and encourage others. Rather than see one guilty individual escape, what number of innocent ones he would see suffer, it is not so easy to say.

A legislator ordaining, a judge decreeing, that whatsoever a man sells that is fit to eat, (if the individual be one whom the king delighteth to honour with his punishments,) he shall be punished and ruined for it! Would you wish to see such a government, go not to Rome under Tiberius — go not to Rome under Nero;—come to England under George IV.,—look to the Treasury under Lord Liverpool and Mr. Vansittart. For a competent ground of punishment there can be no want: coffee is among the subjects of taxation, coffee is among the eatables and drinkables taken for breakfast; and the thing sold, be it what it may, is capable of being eaten or drunk instead of it.

To that division of penal cases, which are such for want of an individual specially injured, and which, from some cause or other, have escaped the being raised to the rank of criminal ones, the above-mentioned observations will be found to apply, without any variation that will not readily enough present itself.

§ 2. *Use of jury's unanimity, causing weakness in Government.*

After all, the great and principal use of jury trial has been keeping up an all-pervading weakness in the whole frame of government.

1. The state of the English people has been, in comparison with that of other nations, to such a degree felicitous, as to have been with

* Written in 1821.—ED.

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justice styled, in the language of its rulers, the envy and admiration of the world.

2. The prosperity thus possessed has had for its cause the state and condition of the government, taken in all its parts.

3. It has had for its cause the state of the governors, with reference to their effective power over the governed.

4. But under that head it has had for its cause, not the efficiency and plenitude of that same power, but its inefficiency; not the strength of the governors as towards the governed, but their weakness.

5. It has had for its cause, not the degree in which the designs of the governors in relation to the governed have taken effect, but the degree in which they have failed of taking effect.

In England, government has had for its end in view the greatest happiness, not of the greatest number of the community, but of the comparatively few by whom have been shared among themselves the powers, and thence the sweets of government.

This state of ends in view is the result of that general habit of self-regard and self-preference which has place in the whole species, and is not merely subservient to its well-being, but necessary to its very existence.

To this rule as applied to governors (to those by whom the powers of government are exercised,) not even does the case of the Anglo-American United States afford an exception. Over the few by whom the powers of government in detail are seen to be exercised — over those in whose hands the operative branch of government is lodged, stand the many in whom is lodged the *constitutive* branch, with relation to these same possessors of the operative branch of government; the possessors of the constitutive power placing, either by an immediate or unimmediate exercise of that power, the possessors of the operative power; and the possessors of the constitutive power either of themselves constitute the greater number, or are so linked to them by community of interest, as that the interest of the greater number cannot be sacrificed by them, without the sacrifice of their own.

In this state of things, whatever in a different state of things would have been their wishes, designs, and endeavours, by the possessors of the supreme operative power never are any endeavours employed to give effect to that universally-natural and universally-prevalent self-preference; for where success is manifestly impracticable, neither endeavour nor design is likely to have place.

Of those by whom in this country, which is the envy and admiration of surrounding nations, the powers of government have been exercised, the wishes, designs, and endeavours never have been, nor can have been, any other than the wishes, designs, and endeavours of those by whom the powers of government have been exercised in these same surrounding nations.

But in England, several causes have concurred in preventing these wishes, designs, and endeavours, from having to so large an extent been carried into effect, as in these same surrounding nations.

Of these causes, the power that has been exercised by juries has been a principal, if not the principal one.

The causes appear to have been as follows:

1. The insular state of the country, whereby it has in an almost exclusive degree, ever since the Norman conquest, been preserved from hostile inroads, with the waste attending them, under which, at the hands of one another and the English, those other nations have so frequently and extensively been suffering. The division into South and North Britain, while it continued, formed to a certain degree an exception: say, in a word, *insularity*.

2. The other causes may be comprised under one general denomination — general weakness in the frame of government.

The following are the particular causes of which this general cause may be said to be composed: —

1. Jury-trial, more particularly in its application to such penal causes in which it has been the interest, real or supposed, of the monarch, and those in authority under him, that conviction should ensue.

2. A beneficial effect, and that the principal one, of the power of juries, has been the comparative inexecution and inefficiency of the design and endeavour of the other constituted authorities against the liberty of the press and public discussion.

3. The weakness infused into the general frame of government by the lawyer class, by means of the course of practice pursued by them, and rules laid down by them in prosecution of their own particular and sinister interest.

Had the measures of government had for their end in view the greatest happiness of the greatest number — had the laws and operations of government been in a uniform manner constantly directed to that end, — far from operating as a remedy to evil, all such weakness would have been itself, in the whole extent of it, an evil — an evil proportioned in its magnitude, to the importance of the parts of the law thus weakened and rendered ineffectual to those ends.

As it is, it has to a great, to a vast extent, operated as an evil: nor, in its character of a remedy to the greater evil, has its efficacy been more than partial: in particular, as to the preserving from utter destruction the liberty of the press.

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But partial as the effects of this remedy have been — partial as the effects of this, together with the other causes of debility in the form of government, have been in their character of a remedy against misgovernment, — to such a degree has the whole form of government, taken together, been repugnant to the only legitimate end of government, the greatest happiness of the greatest number, that notwithstanding the partial evils produced by, and proportioned to, the general weakness in the form of government, such is its nature, that by every fresh degree of weakness introduced into it, the interest of the greatest number is served in a greater degree than it is disserved; and supposing the weakness to end in utter dissolution, the utmost quantity of evil attendant on such dissolution would not be nearly equivalent to the quantity of good, which its certain consequence, a real constitution, having for its end in view the greatest happiness of the greatest number, would produce.

Among the laws by which the greatest happiness of the greatest number has been sacrificed to the happiness, real or supposed, of the ruling one, and the sub-ruling few, are the following: —

1. All the laws which give to the persons, property, and other rights of the monarch, and his subordinate rulers, as such, any greater security than is afforded to individuals at large. As individuals, they ought to have whatever protection is necessary: as rulers, they ought not to have any more. In the Anglo-American United States, no such extra protection is afforded them: and in the Anglo-American United States, instead of being the less secure, they are the more perfectly secure. No King of England — no other man whose seat is called a throne, is so secure against hostile attacks by individuals, as the President of the Anglo-American United States is.

2. All laws having for their object any obstruction, either direct or indirect, to the free communication of opinion in relation to matters of government on the part of individuals, whether in writing or by word of mouth. In the condition of that people may be seen, and is seen, by all that can endure to see it, the fullest proof that no restraints upon any such freedom are necessary to the maintenance of the most profound tranquillity, under a government in which the greatest happiness of the greatest number is the object really pursued. In that same example may also be seen another proof, that of all such restraints, the effect is not to cause tranquillity, union, good-will, or any other such moral instrument of felicity, but to disturb it.

Under this description come all laws against treason, and sedition — all laws against the application of the press to the purpose of indicating grievances in the government, and proposing remedies to those grievances, or to the purpose of holding up to view misconduct in any shape, on the part of any persons concerned in the exercise of the powers of government — any public functionaries, considered as such. And under the name of laws must be included all sham or spurious laws, as well as genuine ones: meaning by sham or spurious laws, the laws, as they are called, made under the name of *rules* of law, by judges, on pretence of declaring what is law; for the genuine and the spurious are so mutually interwoven, that to separate them is impossible.

Of the laws and rules of law made against the liberty of the press, the object and endeavour has been to secure not only impunity, but non-divulgation, to all misdeeds committed on the part of any of the persons concerned in the exercise of the powers of government — of the public trustees of every class — to the prejudice of those for whom, for form's sake, they every now and then acknowledge themselves to be in trust. Laying down such a rule, was doing much farther towards the establishment of a complete despotism, than was done by those who, in Hampden's case, sought to invest the king alone with the unlimited power of taxation, and had much less excuse for it in precedent. It was in effect an open avowal of misrule in all its branches — a declaration of war on the part of all those who bear a part in the exercise of the powers of government, against all those on whom, and at whose expense, those powers are exercised — a declaration of war by all rulers against all subjects.

Had it been carried into effect, by no imaginable particular act of oppression or depredation on the part of rulers, could resistance, rebellion, deposition on the part of subjects, have been more completely justified: for by it, the design and determination to persevere, and for ever, in every such tyrannical course, was openly professed. Had it been with any consistency carried into effect, such would have been the result: and it would of course have been carried into effect, had it not been for the power still remaining in the hands of juries.

In England, any such notion as that of suffering a judge to treat as guilty an individual who, in the opinion of a jury, had been declared not guilty, would be intolerable; — scarcely would the highest paid, and most determined confederate, or instrument of despotism, venture to accede to it: indeed, supposing it to apply to libel law, or, in a word, to any offences in regard to which the influential members of the government took any interest, juries might as well be discarded altogether. But countries are not wanting, in which an arrangement of this sort might be attended with preponderant advantage: for

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countries are not wanting, in which the admission of juries, with powers equal to those possessed, howsoever exercised or left unexercised by English juries, would be incompatible with the existence to any good effect of penal, not to say of non-penal laws.

Suppose the exercise of this power on the part of the judge limited to the cases in which, in the event of ungrounded punishment, the injury done by it will not be irreparable; the injury done by it would be as nothing, in comparison of the mischief that would be done, either by an unchecked jury, or an unchecked judge. To any misuse of this power on the part of the judge, checks of no inefficient nature would be applied by an adequate recordation of the evidence, and regular reports of all such cases, made to the central authority in the seat of supreme judicature: still more, if the importance of the case warranted any such expense as that of printing and publishing the evidence in the district in which the cause has been thus decided.

§ 3. *In what causes shall a jury be employed.*

In no civil cause, in the first instance.

In every civil cause, in the way of appeal.

In all penal causes in which reputation is affected; viz. that class which in French law used to go by the name of *grand penal*. In general, not in the first instance in penal causes, by which reputation is not affected; viz. in that class which used to go by the name of *petit pénal*. But in all these in the way of appeal.

In English law, (with the exception of those causes of which the sort of judicatory styled a court of equity takes cognizance, and those of which, by local statutes, cognizance is given to the small-debt courts, and a few of a miscellaneous nature, of which cognizance is given to justices of the peace acting singly, or in petit sessions, or in general sessions,) every cause goes in the first instance to a judicatory with a jury in it; also in the second instance, if the great four-seated judicatory, out of which the cause was sent to the compound judicatory composed of one of the twelve judges with a jury, have thought fit to give leave.

Of the causes which are thus brought before a jury in the first instance — in the far greater number, justice is outrageously violated by the course thus taken — outrageously violated, and of course for the benefit of the class by which the violation has been established.

In by far the greater number of causes, there is nothing for the jury to do; in fact, there is no dispute. The litigation has for its cause no other than, on the part of the defendant, either inability or unwillingness to do what he is by law bound to do, and thus required to do; viz. in most cases, pay a sum of money.

Wherever inability is the cause, whatever is the degree of insufficiency antecedently to the commencement of the cause, that degree is deplorably heightened by the progress of it. By the defendant, delay is purchased — purchased at a usurious interest; and the hands by which the interest-money is received and pocketed are — instead of those of the injured plaintiff, those of the lawyer, and those of the man of finance: enormous taxes having been imposed on such chance as an injured man was obliged to purchase in the lottery of what is called justice. If the price so paid for delay, were paid in the shape of interest on the money due, the quantum of it would run in proportion to the amount of the money due: it would be proportioned to the advantage gained to the defendant by the non-payment, and to the disadvantage suffered by the plaintiff from that same cause. As it is, it bears no proportion to either standard: it is the same, whether the principal money due be 40s. or £40,000.

Of another class of cases that are brought before a jury, cognizance by a jury is not possible: the impossibility has for its cause, the time necessary for the statement and discussion of the case. In the most ordinary species of cause, the statement and discussion by advocates on both sides, the charge given by the judge, and the consideration bestowed by the jury, occupy a considerably less quantity of time, than that during which twelve men can continue sitting together without inconvenience. But there are some causes, the hearing of which in this mode could not be completed in many times that portion of time. Various are the sorts of causes thus circumstanced. The most commonly occurring sort, and those which are most readily conceived to be in this predicament, are causes of account. The attorney, and the advocate or counsel, as he is called, by whose advice a case of this sort is brought before a jury, knows full well, that by the jury, when it comes before them, nothing will or can be done in it. When the jury is sitting, with the judge on the bench above them for their direction, a discovery is pretended to be made, that in that way it cannot receive a decision. The advocates on both sides having laid their heads together, the discovery is announced to the judge—to the judge, whom long experience has prepared for the receipt of such discoveries. Then comes the necessary resource — sending the cause off to arbitration: arbitrators are then appointed, who are almost always some of the advocates themselves, or their connexions. An advocate on each side, or one chosen on both sides, now takes cognizance of the cause. The payment he receives being proportioned to the number of his sittings, he takes care that the time of each sitting

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shall not be too great, nor the number of the sittings too small.

The cause may be simple — at the utmost point of simplicity; and in this case happily are by far the greatest number of causes. It may be complex to the utmost pitch of complexity; and in this case are unhappily not a few. In the former case, the delay created, and expense bestowed on jury-trial, is the whole of it a waste. Simple or complex, under the English system, one jury is allotted to every cause, and to no cause more than one. Were the parties heard in presence of each other at the outset, nine-tenths would be disposed of in as many half-hours; and of the remainder there would be some in which would appear at the first hearing, from one to half-a-dozen or more points, capable of constituting each of them matter for a separate jury-trial, and capable upon occasion of being distributed, for dispatch sake, amongst as many juries.

§ 4. *Effects advantageous and disadvantageous.*

Direct and indirect: — of the effects of jury-trial, this may serve for the first division.

By the direct effects, I mean those which flow in an immediate way from the causing the decision to be given by a jury, — instead of its being pronounced by a judge or set of judges,—and that are produced independently of any influence exercised by this circumstance on the conduct and character of the judge.

Consider in the first place the effects of the first order; viz. the influence exercised by this circumstance on the rectitude of the decision pronounced in each individual cause, considered without reference to other causes, and without reference to the feelings of any persons other than those of the parties to the cause, and their particular connexions.

Supposing that, on the part of the judge, adequate moral aptitude be to be depended upon, no advantage — no superior probability of rectitude of decision, could reasonably be expected, from the substitution of this ever-changing judicatory, to a permanent one. Neither in respect of intellectual appropriate aptitude, and more particularly appropriate information, nor in respect of appropriate active talent, could a company of men, taken promiscuously from the body of the people, and charged, perhaps for the first time, with the function, for the apt discharge of which such close attention, coupled with so much discernment, is incidentally necessary, — be reasonably regarded as equal, much less as superior, to a man in whose instance the business of judicature has been the subject of the study, and for a time more or less considerable, of the practice of his life. But in every as yet known system of judicature, into which jury-trial has not been admitted, appropriate moral aptitude has been upon so bad a footing, that the comparatively greater moral aptitude, which has in practice been given to juries, has more than compensated for whatever deficiency has had place in their instance, in the article of intellectual aptitude, and that of active talent.

As no cause is ever submitted to a jury but in connexion with a judge, to whose instruction they are, by the force of known usage and public opinion, predisposed to have regard, the appropriate information of the judge, whatever it be, is customarily at their command; and it is only by some particular and not customary direction given by them, with or without reason, to their will, that this supplement to their own inbred intellectual aptitude can fail to be turned to use: and where moral aptitude fails, insomuch as the judge is disposed by any cause to decide in a manner contrary to that which, in his eyes, is justice, the probability of rectitude of decision is, instead of being increased by superiority in appropriate intellectual aptitude or active talent, proportionably decreased.

Note, at the same time, that means exist whereby moral aptitude on the part of the judge may be placed on a much firmer footing than it has ever been as yet, and at the same time be made to receive increase.

One point there is, in respect of which, on the part of the judge, if jury-trial be not employed, appropriate moral aptitude never can with any sufficient ground of assurance be depended upon. This is freedom of bias, whether on the score of pecuniary or other interest, or on that of sympathy or antipathy produced by party affections, or propinquity, or remoteness in respect of rank.

Now as to the effects of the second order. By these I understand, the effects produced by the decision, in the cause in question, on the minds of the several persons within whose cognizance the case in question, in the state in which it presented itself to the judicatory, may happen to come. In this class of effects will be seen to lie the chief and most incontestable of the advantages attendant on the compound judicatory thus constituted.

In the case of misdecision, this class of bad effects consists of danger and alarm — danger of misdecision in future suits, from the influence of the same cause, whatever it be by which misdecision in the past cause was produced — alarm produced by the contemplation of this danger.

In the whole of the judicial establishment, suppose but a single judicatory: for simplicity of conception, call it that of a single judge, habitually exposed to misdecision — for example, by the most natural and common of the causes by which such disposition is liable

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to be produced; viz. by love of money. In such case, the place of general security is occupied by general alarm. No man, who either by poverty, or probity, or consciousness of want of skill to perform with success the process of corruption, regards himself as able to defend himself against a competitor who to the disposition adds the ability to practise corruption; nor can he avoid regarding his property as being in a state of perpetual insecurity. Even he who, to the ability adds the disposition to give a bribe, cannot but regard himself as placed in a correspondent state of insecurity with respect to such part of his property as would be eventually necessary to compose the bribe. Even suppose corruption in a pecuniary state effectually guarded against, still there remain favourable partiality on the score of sympathy, unfavourable partiality on the score of antipathy, as towards individuals individually taken, or as towards all the individuals in general, of whom is composed a party in the state.

See now how the matter stands in regard to the effects of the second order. In the cause in question, misdecision suppose has had place; a wrong verdict, a verdict generally regarded as wrong, has been pronounced. On the feelings of the public at large — of that part of it by whom cognizance has been taken of the cause — what are the evil consequences? Answer, none: Danger, none: Alarm, none. That jury has judged wrong; but that jury is no more. True it is, that by the same causes by which misdecision has been produced in the instance of that jury, the like effect may, for aught anybody can say, be produced in the instance of any other juries. True this, and what nobody can deny. Still, however, neither the alarm, nor even the danger, is in this case anything considerable, in comparison of misdecision on the part of a judge, when produced by any permanent, extensively operating, and well-known mental cause. In nine cases out of ten, perhaps nineteen cases out of twenty, on the part of the jury misdecision will not have place; for in some such proportion are the causes which (being defended through inability to do what should be done, or through perverseness) do not admit of doubt: and in causes in any proportion, evil disposition as above might produce misdecision in the case of an unchecked judge. But be the danger ever so small, the alarm will be still smaller. To this difference contribute several causes: — 1. The general prepossession in favour of this mode of trial; and, 2. The confidence which, setting aside the causes of mistrust, men naturally have in their own good fortune.

English law may furnish a familiar example. Prosecutions for alleged libels, and other offences against government, frequent: verdicts, some for the prosecutor, the government; some against it, for the defendant. Now suppose these causes, all of them, tried by any judicatory of four of the twelve judges, or by any one judge of any such judicatory, and in both cases without a jury, — who is there of any party, by whom, antecedently to trial, any the least doubt could be entertained but that a decision affirmative of the guilt of the defendant would be the result?

Another division, in which the effects of this institution may be considered, is the following: —

I. Applying itself to the situation of the judge, it has a strong and incontestable tendency to give increase to his appropriate official aptitude, considered in all its branches.

1. To his moral aptitude it gives increase, by the obligation it imposes upon him, of giving, with reference to justice, the best appearance possible to everything which, on the occasion in question, he does or says. In so far as upon the effect of what he does or says depends the decision given by the jury — only in so far as what he does and says, has in their eyes the appearance of justice, can he hope to exercise any influence upon the decision they are about to pronounce. Take away the jury, the judge does exactly what he pleases: if he pleases, he says whatever he pleases, and as little of it as he pleases. If so be that, in the individual cause in question, he is bent upon injustice — if in support of the decision which he is determined to pronounce he can find anything to say which in his eyes is plausible, he will, if he thinks it worth while, say as much accordingly: if he be unable to find anything that is thus plausible, or the trouble of doing so is in his eyes too great, he will say nothing at all, and his will will not the less be done.

2. Appropriate intellectual aptitude, including appropriate professional information.

In this particular, the salutary influence of the necessary presence of the jury, and the demand it may be continually creating for appropriate discourse delivered by him to them in the presence of a company of spectators, contributes in a powerful and incontestable manner to secure the interests of justice — at any rate, against inaptitude in any manifest or flagrant degree, in respect of this branch of appropriate aptitude.

3. Appropriate active talent. Without any considerable difference, the above observations apply to this branch likewise of appropriate aptitude.

Set aside the institution of a jury, the most complete corruption may be united with more than ordinary intellectual weakness and ignorance, and more than ordinary deficiency in respect of faculty of expression, and still the man be not incapable of giving effect to his will in the situation of a judge. For his decision, be it what it may, expression must

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be found. But when that is done, all is done that is necessary for him to do: the least said, says the proverb, is soonest mended.

II. General effect on the minds of men in the character of jurymen.

The effects of the institution on the minds of the men to whom it happens to find themselves in a state of exercise in the situation in question, are not less salutary nor less incontestable. Every judicatory of which a jury forms a part, is a school of justice: without the name, it is so in effect. In it, the part of master is performed by the judge; the part of the scholars by the jurymen; and what takes place, takes place in a company more or less numerous of spectators. The representation there given is given by a variety of actors, appearing in so many different parts. There are, at any rate (or at least there ought to be, where no bar is set by special and preponderate inconvenience,) the parties on both sides: on one or both sides there are commonly witnesses: there are but too commonly professional lawyers, in the character of advocates; and there are, still more too commonly, others in the character of attorneys. By the various parts in which these actors in the judicial drama appear, and by the various casts of character exhibited by different individuals in each part, affections of all sorts in the breasts of jurymen are excited, and the attention fixed; and the reasoning faculty, with matter infinite in variety for it to operate upon, is continually called forth into exercise.

The inconvenience which, in the shape of labour and corresponding expense to the individual jurymen, if uncompensated, or to the public purse if they are compensated, constitutes a drawback which there will be occasion to speak of in another place. Against that loss on this score, will be to be set the profit on the above score — and that, it may be seen, is no inconsiderable one.

These benefits, it may be seen, may be attained, if not in a perfectly equal degree, not very sensibly less than equal, so as a verdict be but given by the jury, whether that verdict be or be not binding upon the judge.

Of the good effects actually produced by jury-trial in particular causes, over and above its general and more extensive influences as above explained, much will depend upon the state of the law. In proportion as the law is clear, the power given to the jury in form, will be exercised by it with effect; the verdict given by the jury will be the expression of their will, acting under the guidance of their understanding. In proportion as the law is otherwise than clear, the verdict given in form by the jury will in effect be the decision of the judge; it will be the expression of his will, in the giving effect to which his understanding, such as it is, and his active talent, such as it is, assisted by such appropriate professional information as it has happened to him to lay in a stock of, will have been employed. Thus it is, that under an all-comprehensive code, especially if accompanied with an apt Rationale, a jury will be quite a different sort of instrument from what it is under the generally prevalent mixture (composed in indeterminate and ever-varying proportions) of statute-law and common-law, — that is, of really existing law, and that counterfeit species of law which has been imagined and framed on each individual occasion by the judge in question, and his predecessors.

The branch of law, with relation to which the usefulness of jury-trial to the greatest happiness of the greatest number is most conspicuous and most unquestionable, is the penal branch. The feature by means of which it is productive of this beneficial effect, is the universal concurrence, so erroneously termed *unanimity*.

The effect by means of which it is productive of this benefit, is by infusing a general weakness into the powers of government: into the powers of government taken in the aggregate, but more especially when considered in relation to the people.

In England, the sacrifice made of the greatest happiness of the greatest number, to the happiness, real or supposed, of the monarch, has been less in proportion than in any of the monarchies of the continent of Europe. Of this difference, whatever it may be, the cause will upon examination be found to be in the weakness of the government as towards the people. In England, several causes have concurred in the keeping up of this weakness As to those other causes, they are beside the present purpose. The only one that belongs to it, is the weakness, in so far as produced by jury-trial, with its unanimity in penal causes.

Had it not been for this weakness, the condition of Austria would at this moment have been the condition of England. George the Fourth would have been in England, what he is in Hanover: in the one country, as in the other, the people equally poor, and equally miserable. From what he is in one country, may be seen what he would be in the other.

The benefit produced by jury-trial with its unanimity, is produced by striking the laws every now and then with impotence. The law is the work of the king: and in the production of the work he has two instruments — the houses of parliament taken together, and the supreme judges.

The houses of parliament make law in one way: the judges make what they call law, and what has the effect of law, in another way.

The law, by whomsoever made, — being made, not for the benefit of the greatest happiness of the greatest number, but for the

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benefit of those by whom it is so made, — is made of course principally for the benefit of the king, in which way soever made.

By whatsoever laws, by the good, or supposed good, done to the king, evil to a greater amount is done to the greatest number, — it is for the good of the greatest number that those laws should remain in the greatest possible degree unexecuted and inefficient. Of the laws which havethis effect, so great is the extent, that rather than the effect of those laws should not be weakened, it is for the benefit of the greatest number that the effect of the whole body of law taken together should be weakened.

In England, the superior judges, — more particularly those of the King's Bench, are in possession and exercise of a power, the exercise of which is of itself sufficient to the establishment of the most tyrannical despotism. They take a word or a phrase, and in the use they make of that phrase they find a pretence, and that an unquestionable one, for inflicting punishment without stint, on any person they please, for any act they please.

The phrase *contra bonos mores*, Latin as it is, serves them for inflicting punishment without stint on all persons by whom any act is done, which does not accord with the notions they entertain, or profess to entertain concerning morality.

The phrase, *Christianity is part and parcel of the law of the land*, serves thus for inflicting punishment without stint on all persons by whom any act is done, which does not accord with the notions they entertain, or profess to entertain, concerning Christianity.

The word *conspiracy* serves them for inflicting punishment without stint on all persons by whom any act is done, which does not accord with the notions they entertain, or profess to entertain, concerning the act in question.

It is not true, it may be said, that any such despotism is in their power; for above them sits parliament; above them also in parliament, a king who can do no wrong, nor would suffer wrong in any such shape to be done. For, not to mention the wrong which in this case would be done to subjects, a despotism thus established would be established in contempt of the authority of parliament.

Yes: thus much is sure enough; namely, that without the consent at least, not to speak of anything more than consent, of the man who can do no wrong, no wrong in this shape can be done. But in this shape, and by such instruments, by the man who can do no wrong, wrong to any amount can be done, in a manner at once more effectual, and in a variety of ways more commodious, than by any such an unwieldy instrument as that called parliament.

He can do no wrong, because wrong becomes right by his doing it. As the God which is in heaven can commit no sin; so the God which is upon earth — the God of Blackstone's creation and of all men's worship, can do no wrong.

The beneficial effects of jury-trial are produced in a different shape, in the civil branch and in the penal. In the civil branch, it is by applying a bridle to arbitrary power in the hand of the judge: in the penal branch, as we have seen, contributing to infuse weakness into the body of the law.

Under governments in which the institution of a jury has no place, the judges not being in those countries, removable, either immediately or unimmediately, by the power of the people, a man who upon any account sees an adversary in the person of the judge, may behold in that functionary a tyrant, from whose power (which may be sufficient to effect his ruin) he sees no possibility of escape. From a situation thus distressing, the institution of a jury affords relief. Suppose a man to have suffered on one occasion — suppose a man to have suffered from enmity in the breast of one or more of the jurymen, no such sensation as that of inevitable oppression presses upon him: what he has an assurance of is, that a jury composed of exactly the same individuals will not have to try him on any other occasion; what he may at the least have the hope of is, that on a jury sitting on another occasion, the same adversary or adversaries will not have place.

In the penal branch, the like good effect is produced in the same way; but in the penal branch, to that good effect, another, and still more important, is added. In the penal branch, the institution of a jury contributes, in conjunction with other causes, to the production of that weakness in the law, to which this country — which in this case is looked to as a pattern, and from which all conceptions on the subject of jury and jury-trial are taken — is mostly indebted for those liberties, by which it is distinguished from other countries. It is from the circumstance of unanimity that the effect is produced. By a single individual out of twelve, the hand of the law is capable of being paralysed.

In consequence of this unanimity, *i. e.* in consequence of its necessity to conviction, it is in the power of any one man, by surmounting the patience of the rest, to command the verdict, and thereby, be the law and the fact ever so clear in the condemnation of the defendant, to produce his acquittal.

In this false declaration of unanimity may be seen the cause of almost the whole of the afflictive confinement which at present has place in the case of juries. The unanimity out of the question, the verdict would be decided by votes; and in the ordinary state of things,

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the voting would take place immediately upon the delivery of the charge by the judge. In two cases alone would any delay in the delivery of the verdict have place: — 1. If in the instance of this or that juryman, a desire were expressed of receiving instruction from any other. 2. If by this or that juryman, a desire were expressed of communicating instruction to this or that other, or to the rest.

§ 5. *Proposed unimpowered jury, its uses and regulations.*

The only circumstance in which the species of jury here proposed differs from the jury in use is this: — viz. that whereas the decision pronounced by the actual jury is — bating some special and assigned cause of nullity — binding upon the judge, the decision of the proposed unimpowered jury is, as the denomination here given to it imports, not binding upon the judge.

In general terms, the use of the unimpowered jury consists in this: — viz. in its capacity of being introduced into any country in which the state of society is regarded as not being sufficiently advanced to render it conducive upon the whole to the purposes of justice, to vest any such power in the great body of the people.

A country may be supposed, in which, though the great body of the people are not in so advanced a state as to render it eligible to repose this power in their hands, yet this may not be the case with a certain distinguished portion of the people, who on this occasion may be distinguished by the appellation of the higher orders. Admitting the existence of such a distinction, it may be a question whether it might not be more conducive to the greatest happiness of the greatest number to attach to the judicatory an unimpowered jury, composed altogether of the lower orders, than an ordinarily impowered jury composed exclusively of the higher orders, or conjunctly of the higher and lower orders.

But to take the more simple case in which, without distinction of orders, the supposition is that the state of society is not such as to admit of an impowered jury, of whatsoever materials composed.

In this case, without any the least prejudice to justice, the advantages belonging to an impowered jury may to a considerable degree be given to, or rather would of course have place in the case of, this sort of unimpowered jury.

1. In the first place, there would in this case, as in the other, be the same sort of aid to, and security for, the appropriate aptitude, intellectual as well as moral, on the part of the judge.

2. In this case, as in the other, the people would, in every judicatory to which this appendage were attached, behold a school of justice.

Regulations in the case of an unimpowered jury: —

1. The question will be to be reduced to a single alternative: an option to be made between two mutually contradictory propositions: Examples, guilty or not guilty? for the plaintiff or for the defendant?

2. The number of persons in the jury, odd, viz. that in every instance a majority may have place.

3. Mode of voting, secret, otherwise termed by ballot.

4. On hearing the decision, the judge does in regard to it as he thinks proper: he either reverses, or confirms it with the exception of such alterations as he thinks fit.

5. In the books of the judicatory entry is in each instance made of the verdict pronounced, and of the course taken by the judge in relation to it as above.

By comparison of different periods, the advance made in the state of the public mind may be ascertained. The smaller the proportion of the cases in which the verdict is reversed or altered, to those of the cases in which it stands unchanged, the greater the progress made by jurymen in the character of scholars in this school of justice.

Not in the lowest stage of society, actual or possible, can any conceivable mischief be produced, by the intervention of a popular judicatory thus destitute of all power of doing mischief; and sooner or later, by this institution alone, would the state of society be raised from the lowest level to the highest. By way of encouragement, that the men thus placed in a sort of judicial situation may be impressed with a sense of their own dignity, and their functions be an object of desire and source of satisfaction rather than aversion, a station somewhat elevated and ornamented should be assigned to them, with something of a decoration to be worn about their persons.

§ 6. *Jurymen who? What persons should be capable of serving as jurymen.*

Answer: Generally speaking, under a system of universal or virtually universal suffrage, as under the most popular of the American United States, take for the general rule all persons of the male sex who are of full age and are able to read. For the mode of ascertaining the reading qualification in the most commodious manner, see Bentham's Radical Reform Bill.

In that case no exceptions were needful. Why? Because the aggregate number of all the persons of different descriptions, against whose admission any valid objection could be raised, was in that case not considerable enough to produce any well-grounded apprehension of their exercising an unfavourable

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influence on the result; and because, each person delivering his vote separately, no person would be exposed to experience annoyance in any shape from any other. Delivering a vote in an election requires nothing but a will: an understanding? yes, this likewise; but an understanding which always can, and without impropriety may, have taken another understanding for its guidance.

Not so in the case of a jury: each man's understanding is, by the incident of the moment, and in a state not prepared for the occasion, called into exercise. It may, it is true, take another understanding for its guidance, but ere it can have made choice of any such directing understanding, it must itself have been put in exercise.

In the case of the election, the influence of any one vote on the result cannot be otherwise than extremely small. In the case of the jury-trial, where, as in Scotland, unanimity is not necessary, a single vote may suffice to determine the result.

In the case of the election, each voter appearing upon the spot and delivering his vote separately, no one individual is exposed to annoyance at the hands of any other. In the case of the jury, it being necessary that they should sit all of them in company of each other, it may happen, that by a single individual in whom the capacity of producing annoyance in this or that shape, with or without the inclination, has place, annoyance may be produced in such shape and degree as may suffice to give disturbance to the whole operation: in such sort that misdecision, or more naturally non-decision, is produced, not to speak of the discomfort produced at the same time to the individuals.

With what degree of frequency is it desirable that within a given length of time the function of a juryman should by the same individual be exercised?

There are considerations which operate in extension of the time; others which operate in limitation of it.

As to the direct and particular use of the institution, the more frequently this function comes to be performed, the more experience the individual gains, and the more fitted he is thereby rendered for it.

Under the head of uncompensated labour, which is as much as to say expense, — the greater is the hardship, the heavier is the tax which is in this case imposed.

Another inconvenience is, that, in proportion to this frequency, the condition of the juryman is made to approach that of the permanent and official judge, and thereby the inconveniences attached to such permanence are brought into existence.

When considered in the capacity of scholars in the school of justice, the more frequently those who have been entered into this school are exercised, the greater will their proficiency be: then, on the other hand, the more frequent the exercise given to those who are thus entered, the smaller is the number of the members of the community to whom, in this character, the instruction is imparted.

The two evils, the exclusion of which is on this occasion to be avoided, are — the punishment of non-offenders, and the non-punishment of offenders.

I. Against the punishment of non-offenders, the following are the modifications that present themselves: —

1. Necessity of unanimity to warrant conviction and punishment.

2. In case of dissentience, necessity of a majority. This majority is in its extent absolute and relative; susceptible of degrees, of which the highest is *that* in which the minority consists of no more than one; and the lowest, *that* in which the majority exceeds the minority by no more than one.

To contribute to the effect desired, it is not necessary that the want of unanimity, or of that extra-majority which is thought fit to be required, should have for its effect acquittal, and the consequent exemption of the accused from all punishment. Its effect is capable of being limited, to the giving him exemption from the highest degree of punishment, or from the highest and the next to the highest, and so downwards, in the scale of punishment.

Of this modification the usefulness is more particularly conspicuous and undeniable as applied to irremediable punishment, and in particular to that mode of punishment which alone is completely and absolutely irremediable, viz. mortal punishment.

Note, that the greater the absolute number, *i. e.* the total number of those of whom the jury is composed, the greater is the greatest relative number of which the ultra-majority is capable of being composed.

II. Non-punishment of offenders.

From the giving to a single acquitting voice, or any other such small number of acquitting voices, the effect of producing total or partial exemption from the appointed punishment, follows inconvenience; that is to say, danger of non-punishment of offenders.

The case of corruption is the one most easily provided against; at any rate, that corruption, to the application of which no antecedent intercourse or particular connexion is necessary.

The following are the arrangements by which, in correspondent proportion, the difficulty that attaches upon the application of the corruptive influence may be increased.

1. Increasing the number of the minority necessary to overrule the opinion and will of the majority.

2. Subjecting the choice of the jurymen on

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each occasion to the power of chance, and at the same time giving to the interval between the election thus made, and the delivery of the verdict, the shortest duration possible.

Not slight is the grievance produced by so large a number as twelve, so inexorably required in all cases. For the correction of it, we need no other instruction than that which is afforded by the instances in which superior power is lodged in less trustworthy hands.

True it is, that there have been twelve apostles. Before them, there were twelve months in the year, twelve divinities of the highest class, and twelve divinities of the next highest class. Since then, there have been twelve Knights of the Round Table of King Arthur.

In the case of jurymen, as of all other functionaries, the problem is, how to secure on their part, with reference to their function, the maximum of the aggregate appropriate aptitude.

In this instance as in others, elements of appropriate aptitude, three,—viz. appropriate moral aptitude, appropriate intellectual aptitude, and appropriate active talent: branches of appropriate intellectual aptitude, two,—viz. appropriate knowledge, and appropriate judgment.

Of these elements, the first in the order of consideration, and as it should seem of importance, is appropriate moral aptitude. But for no one of these three elements, can any proper provision be made, without consideration had at the same time of the other two.

As to appropriate moral aptitude. For securing this quality, reference must be made to the causes of relative inaptitude. For securing aptitude, the course to be taken will be, to counteract the influence of these sinister causes.

For applying the proper remedy against delinquency, the first thing to be done is to bring to view the source of the correspondent temptation.

This will be, on questions between individual and individual, partiality in favour of either side to the prejudice of the other: on a question between individual and government, partiality in favour of either side to the prejudice of the other.

As to this matter, partiality in favour of the individual, to the prejudice of the constituted authorities as such, is of course in any individual instance possible. But what is beyond comparison more probable is, partiality in favour of government, to the prejudice of the individual; so much more ample and securely efficient are the means of rewarding, and thus procuring partiality, in the hands of government, in comparison with the most efficient means that can be generally employed by individuals.

Widely different, in respect of the amplitude of the source and probable degree of efficiency, is the temptation in favour of any individual, compared with the temptation in favour of government, which is, in respect of quantity, practically speaking, infinite; and in respect of constancy, applying itself in every case in which, avowedly or unavowedly, government has any concern.

In favour of an individual, it is only in a comparatively small number of cases that partiality can find means to operate with any chance of success.

On this side, partiality will require to be distinguished into natural and factitious.

For examples of natural partiality, take the following:—

1. The jurymen having a natural, though more or less remote and undefined, and thence an unseen, interest, in a pecuniary or other shape, in the event of the cause.

2. Jurymen, in this or that proportion of the whole number, having connexion in the way of interest, or sympathy, with a party on either side of the cause.

3. So a feeling of hostility in the way of antipathy.

Now as to temptations in a factitious shape, those of a pecuniary nature are at once the most obvious and the most extensively applicable. The act by which temptation of this nature is applied, and applied with success, is, if it be in a pecuniary and tangible shape, termed bribery; or if in a less tangible shape, corruption; though even in any case in which the word bribery is employed with propriety, so may the word corruption: corruption being the genus, bribery one species of it.

Much more difficult to contend with is the case where the source of the temptation is natural, than where it is factitious. Where it is factitious, you may by means of dispatch prevent the application of the instrument of temptation: where it is natural, the instrument of temptation is already applying itself in all its force.

§ 7. *Jury appointment.*

By whom should the members of a jury be appointed?

Answer: By no man, but by fortune. Man has sinister interests; fortune has no sinister interests. Under man's appointment, justice would have no even chance; under fortune's appointment, she will have an even chance, and that is the best chance that can be given to her.

Whatever benefit has resulted from this appendage to the judgment seat, has been produced by its applying as a bridle to arbitrary power, in the hands of the judge, and those in whose particular and sinister interests he is a sharer. From a bridle, his endeavour has of course from first to last been, to con-

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vert it into a cloak, and thereby into an instrument.

The individuals who, on the occasion of each cause, serve in this character are, or at any rate are supposed to be, a minor assemblage, a comparatively minute body, taken out of a comparatively large class. In each instance, therefore, the composition of the jury depends upon two distinguishable circumstances: 1. Upon the situation in life of the individuals composing the class out of which the selection is made; 2. On the situation of the hand or hands by which the selection is made.

In so far as the appointment, by which, in the individual cause in question, the members of the jury are determined, is regarded as having for its cause, avowed or concealed, the will of this or that person, whose will could not, consistently with the acknowledged design of the institution, be thus employed, — the operation, by which effect is given to such will, is called packing.

The class out of which the selection is made, suppose it, in the whole or in the greatest part, composed of individuals whose place is among the ruling few, — or whose eyes, with a view to the advancement of their interests, are habitually fixed upon the ruling few: packing is thus far established, and established by law. Suppose the form of government an aristocracy: here we have a system of packing for the purpose of aristocratical sinister interest.

Suppose the form of government a monarchy, with an aristocracy under it, with or without a colour or shade of democracy: here we have a system of packing established for the purpose of a combination of monarchical and aristocratical influence.

Suppose the composition of the class out of which the selection is made, in a certain degree mixed — some of the individuals, sharers in the particular and sinister interests, others not: in this case it is, and in this alone, that it may be matter of importance what the hands are by which the selection is made. If these be the hands of an individual or individuals belonging to the tainted class just mentioned, as well might the jury be composed exclusively of such hands without any mixture.

From the above considerations result two practical conclusions: —

The body out of which juries are respectively selected should be either —

1. Of the individuals possessing the right of suffrage* in the election of members of the representative assembly under the system of virtual universality of suffrage, — all such whose residence is within the judicial district in question; with the exception of a few classes, such as insane persons, criminal convicts, &c., whose interference, though without effect in that case, would not be without effect in this; — or,

2. A select body, thence not so numerous as that all-comprehensive body, but still amply numerous in comparison of the number of the jurymen, who for the purpose of one or more causes are appointed for one and the same day's service: the body of electors by which this election is performed, the same as that just described.

In either case, fortune's will be the most proper hands by which, for the purpose of each individual cause, the selection can be made.

Fortune is not exposed to the action of sinister interests, of interest-begotten prejudices, or authority-begotten prejudices: every human being is. If the design had really been to prevent the selection of the jury from being rendered partial, and conducive to misdecision, by the influence of those causes, it is to fortune, and not to any human being, that the selection would have been committed. Throughout the whole of the system of which jury-trial is a part, two objects — two intimately connected objects, have been aimed at, in so far as circumstances have admitted, by the workmen employed in the fabrication of the system, viz. the lawyers, — and the kings, whose dependent creatures and instruments they always were; — viz. to secure the real existence and efficiency of partiality in their favour, and to secure the appearance of impartiality. When a man is to make this selection, scarcely in one instance out of twenty will partiality be really without a place in this selector's mind: scarcely in one instance out of twenty, be the partiality ever so strenuous, will there be any outward and visible sign of it. Look over the table of "Springs of Human Action."† That table now lies before me: sixteen is the number of different ones you may see, no one of them less capable of determining and misleading conduct than another: sixteen different sorts of interests, every one of them capable of acting with effect in the character of a sinister interest: sixteen, of which the love of money is but one. In all times, and with the exception of the metropolis, in all places, the sheriffs have been the absolutely depending creatures of the king, placed by the king, engaged in pecuniary accounts with the king, and for the difference between profit and utter ruin, depending on the uncontroulable will and pleasure of another set of dependent creatures and instruments of the king — the barons of his exchequer, judges of the great judicatory of accounts between him and his defenceless subjects.

The judges were placed and displaceable by the king. The sheriffs were placed by the

* Viz. in the primary assembly, that is to say, where, as under the French and Spanish constitutions, there are assemblies constituting stages of election more than one.

† See Vol. I. of this collection.

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king; and at the end of each year, each one of them of course gave place to another, placed in like manner by the king. The jurymen were placed by this creature of the king; and at the end of each short length of time — call it term, call it assize, call it sessions—gave place to another set, selected by the same or another hand, in that same place. In this state of things, wherever the king or any individual dependent on him possessed, in any shape, an interest in the cause, think what would have been the real efficiency of any measures having for their professed object the securing of impartiality in the administration of justice.

By the combination of the two modes of appointment above mentioned, the useful purpose of the institution might in a certain respect be forwarded. Of the jury in each cause, the greater number might be taken by lot out of the all-comprehensive body of electors: one, or some other such small number, out of the select body. What is here assumed is, that it is with a view to superiority in intellectual aptitude and active talent, that the selection is to be made.

Here, then, by the major portion in whom, in respect of appropriate moral aptitude, the reliance is, — obsequiousness or resistance to the guidance of the select few will be manifested, according to what, in their eyes, are the dictates of justice.

The right of expunction, shall it be allowed to the parties?

The room for the exercise of it will depend on the number selected in the first instance.

To any approach towards a satisfactory solution of this question, much more detail would be necessary than the present design could afford.

Serious objection, however, is not altogether wanting. To the party in the wrong, supposing him conscious of his being so, an advantage having place to an extent to which no limits can be assigned, is thus given. Proportioned to the reputation for appropriate aptitude, in all its several elements, possessed by the eventual juror, will be the eagerness of this self-condemned party to put an exclusion upon so assured an adversary.

In election committees of the English House of Commons, this effect of the right of expunction has been matter of experience and remark. Knocking out the brains of the committee, is the phrase by which the expunction has in this case been designated. Of the three elements of appropriate aptitude, intellectual aptitude and active talent have been the two only ones in view. For reference to appropriate moral aptitude, cutting out the heart of the committee, or something to this effect, would be necessary, if, in a body so composed any such organ as a heart could have place.

§ 8. *Securities for appropriate aptitude.*

In the determination of the individuals serving as members of this obligatorily-attending committee of the public-opinion tribunal, the appropriate aptitude of the parties must be kept in view.

Deficiency in appropriate moral aptitude will be corruption, or have corruption for its cause. Corruption is in this case either *precedental* or *subsequential*; namely, with relation to the time at which it is believed, or more or less likely to be believed by the juryman, that, on the occasion of the suit or cause in question, he will have to serve.

Of precedental moral inaptitude, the most extensive causes, in a republican state, are antipathy and sympathy on the ground of party. To evil from this source, the nature of the case excludes the possibility of any completely effectual remedy: all that can be done towards it, is by power of dislocation given to the parties on each side. In this case, in so far as the proposed bias of the jurymen in attendance is known or conjectured, those on both sides against whom the persuasion or suspicion applies with greatest force, will on each side, if the faculty be given, be dislocated.

In the language of English law, *dislocation* thus applied, is *challenging*.

In a monarchical state, supposing any such institution as that of a jury admitted into the judicial system, the system of corruption inseparable from the government will have infused and kept up throughout the whole population, an all-pervading spirit of party sympathy and antipathy, altogether incompatible with right decision in any sort of suit or cause to which it applies.

Partiality from a public cause may be more or less open and exposed to general knowledge or suspicion: partiality from a private cause, much less so.

In the case of a jury, after the exhaustion of the whole stock of possible remedies which the nature of the case admits of, — self-regarding-interest-begotten, sympathy-begotten, antipathy-begotten, and prejudice-begotten partiality, to a vast extent, will have place: and that in such force, that misdecision will continually be the result of it.

Such will be the case, whether the part taken by each juryman be known or unknown —unknown, in so far as the nature of the case admits of its being so; which cannot be the case, but to an extent in a considerable degree limited.

If, as is throughout the case in English practice, the decision is represented as unanimous, — here, that which to no person can be unknown is, that by every member of the jury, concurrence in the obnoxious decision was given; for who the members of

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the jury are, is seen by all present in the judicatory.

Here, then, are all twelve — that being in every case the number — exposed to the enmity of all those to whose wishes the decision is adverse.

A case that may very well happen, and that cannot but happen, is, that without its being either known or suspected, jurymen, one or more, may have a pecuniary interest in the event of the cause — an interest equal, or in any degree superior, to that which any party has on either side. Here, then, is inducement sufficient to cause a single man to produce by the characteristic torture, on the part of all the others, accession to his side. For submitting to it, his compensation may be ample to any amount, while in the instance of no one of the whole number with whom he has to contend, has compensation place in any shape.

Suppose a majority to be admitted to determine the decision; and, in the first place, suppose the side taken by each known in every case, no expedients being taken in the way of concealing it. In this case, the moral corruption, the solemn insincerity and mendacity, is excluded. But the exposure to ill-will, with the attendant inducement to partiality and misdecision through fear, is rendered still more certain and extensive; not one of the jury but makes to himself, and stands for ever exposed to, a host of adversaries — all those without doors whose affections are on the opposite side.

On the other hand, on this supposition, the part taken in the decision by each juryman is exposed to the tutelary action of the public-opinion tribunal. Here, then, is the breast of the juryman acted upon, and agitated by, conflicting interests: as between right decision and misdecision the uncertainty is entire, the suffering certain, and to an unlimited degree capable of being intense: the option may be between having the good opinion and good-will of all persons but one, with whom he has any particular connexion in the way of interest or sympathy, and the forfeiture of the good-will of some one, on whose good offices the whole prospect of his life depends.

Suppose, now, the decision of the majority sufficient, but secresy, by expedients more or less efficient, endeavoured to be preserved — preserved, in a word, by the most effectual of all expedients, suffrages given as in the case of a well-conducted ballot, with all the secresy which the nature of the case admits of: to all persons without doors, the result, in respect of *numbers* on both sides, known and declared: this, and nothing else.

Still as between juryman and juryman — between each one, and one or more, or all of his fellows — the secresy will be in a high degree uncertain.

For the sake of securing in every instance a majority on one side or the other, the number will of course, in that case, be an odd one.

In the case of the smallest odd number, the non-secresy will be complete: numbers in this case, two to one. Each one knowing on which side he himself has voted, will know, if he be the only one on his side, to a certainty, on which side the two others have voted.

If, indeed, he be one of the majority of two, what is possible is, that as between the two others he will not know to a certainty which has been on his side — which on the opposite side. But on this supposition, there must either have been an absence of all discussion, a dead silence, or on the part of the two fellow-jurymen, on one side at least, if not on both, a display of the vice of insincerity; and that in such perfection as to have been successful.

True it is, that as you increase the number, you increase the probability of uncertainty; but the number may rise to five, seven, nine, eleven, thirteen, fifteen, and still, unless discussion be excluded, the probability of uncertainty be very inconsiderable, and after all, but partial, applying to this or that one or other small proportion of the whole number.

§ 9. *Jurymen, number of — proportion requisite to command the verdict.*

1. Number. The smallest capable of fulfilling the purpose.

Increasing with the number is either vexation or expense: vexation to the jurymen, if time, and labour of attendance, and operation, are not compensated for; expense, if they are.

Jurymen, though but ephemeral judges, are not the less judges: call them by that name, the conception in respect of vexation and expense will be the more adequate.

2. Proportion requisite to command the verdict.

In cases non-penal, there is little difficulty. Misdecision may happen in any case; but from the nature of the class of cases thus denominated, no danger is indicated as attaching to misdecision on one side of the cause, greater than from misdecision on the other. If any such difference in point of danger is discoverable, it must be by a particular examination of the cases referable to this head. In one point of view, number and proportion are united. The prime object is to secure decision on the one side or the other, in contradistinction to nondecision; for nondecision, in so far as it has place, is denial of justice. In effect, however, it is decision against the plaintiff's side; but it is without sufficient grounds; for, supposing the ground sufficient — sufficient in the eyes of those to whom it belongs to judge, a decision would be pronounced in positive terms against

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that side. Make the number of jurymen odd, a positive decision on the one side or on the other is by this means secured; and on whichever side it is given, should the decision be erroneous, no greater mischief is as above likely to ensue, than if the misdecision were on the other side.

Very different is the result in a case of a penal nature. By punishment of an individual who is not guilty, greater is the evil produced than by non-punishment of an individual who is guilty.* Of this evil the elements are as follows: —

1. Mischief of the second order: alarm, self-regarding alarm, produced in the minds of the people at large, by the apprehension of undue suffering from the like source.

2. Sympathy with the sufferer and his connexions: pain of social sympathy.

In both its branches this evil will increase with the magnitude of the punishment. — Where the punishment is mortal, this evil is at its maximum. In this case the mischievousness is created, not so much by the magnitude of the punishment, as by its irremediability—by its not being capable of being made to cease, and by the exclusion it puts upon all compensation or satisfaction — upon good in every shape given to a party injured, in compensation for the injury.

To set against the superiority of evil that has place in the case of undue conviction, and consequent execution, as compared with that of undue acquittal, an expedient naturally, and not unfrequently resorted to, has been, the requiring for the producing a conviction, votes more in number and proportion than for producing an acquittal. Hereupon come two opposite dangers: —1. Allow conviction to have place where, in the opinion of one or more of these judges, the offence charged was not committed: in a proportionable degree, the evils above stated as flowing from undue punishment, have place. 2. Give to one, or any other small number of votes, the effect of preventing conviction: you let in the danger of undue acquittal through corruptive influence, or ill-applied sympathy. Of these two opposite evils, neither is capable of being completely excluded; but by apposite arrangements, they are each of them capable of being diminished — diminished, and that in such a degree as to supersede the demand for that multitude which, in the case of these ephemeral judges, has commonly been excessive.

So far as regards criminal cases, the grand argument is this: — Would you endure to see that man treated as guilty, who, in the eyes of though it were but a single individual of such a company, who by office are all good men and true, is innocent?

In the instance of this class of cases, those which are not only criminal but capital — such has been their prominence — have in a manner eclipsed all those whose place is inferior in the important scale. The eclipse is altogether a natural one. In the original pharmacopeia of English jurisprudence, mortal punishment constituted the general remedy: mortal punishment constituting the general rule, punishment short of mortal, the exception. Under a jurisprudence thus composed or organized, think what, in a mind not altogether destitute of human sympathy, must have been the impression naturally made by the conception thus started. As in the eyes of the dissentient juryman, so in all other eyes to which the case presented the same aspect, all who concurred in the verdict of which the death of the accused was the consequence, would wear the aspect of murderers.

The mischief consists in giving to the punishment such a form, that in case of misapplication, the evil of it is irreparable. But to an eye the research of which is confined to the surface, destruction of the offender presents, in the case of punishment in this shape, a degree of security such as is not capable of being given by punishment in any other shape. Experience proves, that from causes foreign to the present purpose, by the giving of this shape to punishment, security, instead of being increased, is lessened. But in the rank of life in question, so sensitive is selfishness, that neither the will, nor the understanding, necessary to a research below the surface, are to be found.

On the occasion of the decision pronounced by the jury, shall unanimity be made necessary?

Otherwise thus: — in giving his suffrage towards the formation of the decision, shall each juryman be permitted to give his own opinion? or shall he be compelled to give as his opinion, that which is not?

Were reason and morality to decide, the question thus put would contain the answer. But in the course given to the practice, reason and morality have been treated with the most complete disregard. Time out of mind, the practice has been determined by custom, the effect of no one can say what cause, in an age of which all that is known is, that it was a barbarous one.

Dissect this transaction, and note well the circumstances of which it is composed: —

1. The decision pronounced by the jury is accompanied by the ceremony called an oath. In and by this oath is understood (if anything is understood) a promise that the opinion delivered by the person in question shall be

* This supposes that the non-guiltiness of the convicted individual either is at the time, or becomes thereafter, an object of popular belief, more or less extensive and intense. For, suppose the contrary, the suffering of one who is not guilty is not greater than the suffering of one who is guilty. It even is not so great. For to support him under the affliction, the not guilty has considerations which the guilty has not.

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an opinion which, at the time of his delivering it, he really entertains. As often as it is thought that a promise of this sort is violated, that is to say, that the opinion which the man has delivered accordingly as his, was not the opinion which he at that time entertained, he is considered in law, and in public opinion and language, as having committed an act repugnant at the same time to the dictates of law and morality. The name by which this act is designated, is perjury. As often as among a jury, at the time of pronouncing the decision thus given in as unanimous, any difference of opinion has place (insomuch that while the opinion given in as the opinion of the whole, is the opinion of one or more, others there are, one or more, whose opinion it is not,) perjury, it is manifest, has been committed. Either this is perjury, or nothing that can be named, is perjury.

Of the persons by whom the perjury in this case has been committed (the whole of the jurymen being twelve,) the number may have been any number from one to eleven inclusive. Not uncommonly the number of perjurers on this occasion is known to have been eleven.

2. Next comes the question, in what way is it that this perjury is brought about? In what way? by what means? The answer is — torture.

By torture, taken in the literal sense, is universally understood the employing pain of body, or fear of the immediate application of it, to compel, at the hands of the individual to whom the pain or the fear is applied, the performance of some act, which it is (or at least, by the person by whom the torture is applied, is thought to be) in his power to perform: to compel him in such sort, that on the performance of the act, the pain or the fear, whichever it is, ceases, but till then continues. Here, then, we have perjury produced by torture.

3. Now as to the person or persons by whom the torture is administered, and the perjury produced.

These persons are of two, or even more descriptions.

For simplicity of conception, suppose it the case where the number of the perjurers is eleven: one, and one alone, not being a party to the perjury. In this case it is by the intermediate agency of this one juryman that the torture, by which the perjury has been effected, has been inflicted on all the rest. At the same time it has been inflicted on him by himself. Thus we see eleven out of twelve jurymen perjured, and all twelve tortured. For the pain of body thus inflicted on himself, the juryman who is not perjured, has received a compensation, which in his eye is adequate: he has saved himself from the guilt of perjury, and he has exercised an act of power over his fellow-jurymen.

When, at the instigation of one person, perjury is committed by another, subornation of perjury is in lawyer's language said to have place: a person at whose instigation the perjury is committed, is in consideration thereof termed a suborner.

Here then we have eleven persons perjured, twelve persons tortured, and one person who is a suborner.

But subornation may have place in a chain of any length. The suborners, one behind another, at so many different distances from the immediate act and its agent, may be such in any number, forming or occupying so many lengths in a chain of subornation. A instigates B to commit the perjury; or A instigates B to instigate C to commit the perjury; and so on to any length.

The immediate suborner would not in the manner above explained have instigated C and the others to commit the perjury, had it not been by the power given to him by another person, who thereby becomes an anterior suborner — a suborner of the first remove: thus forming or occupying another and higher link in the chain of subornation and perjury.

The person by whom this power is possessed and exercised is a judge — the presiding judge: the judge before whom the trial is carried on, and by whom all the operations performed on the occasion are directed.

In this way, on condition of inflicting on himself and the other eleven a degree of uneasiness which no one of them but himself can support, any man has it in his power to prescribe the opinion that shall be delivered by the rest, and thus converts them into perjurers. The number of the persons capable of being on each trial thus dealt with, is the number of the persons employed on the trial in character of jurors.

The mode by which this power is exercised is, to him by whom it is exercised, liable to be so painful, that the case of its being so exercised is not an ordinary one. In the ordinary case, those in the minority give up their opinions, and join with the majority. To this junction, there will naturally be two inducements: — 1. The general perception, that in case of diversity of opinion, the chances in favour of rectitude, will be in the direct ratio of the number of the persons on the different sides. 2. That in a larger number, the chance is greater of its containing an individual capable of thus subduing the others, than in a smaller.

On the other hand, *cæteris paribus*, the chance in favour of rectitude in the case of any opinion is as the number of the persons by whom it is embraced. According to this rule, when by one single man the decision contrary to the opinions of eleven others is thus produced, the probability in favour of wrongness of decision is as eleven to one.

If instead of twelve, the jury consisted of

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no more than three, the probability in favour of a wrong decision thus produced, could never by the above rule be greater than as two to one.

It follows, therefore, that the more numerous the jury acting under this forced and false declaration of unanimity, the greater is the probability of this kind of perjury.

Now as to the general effect of this feature in the institution, on the rectitude of judicial decisions, and on the character of the government — in a word, on the greatest happiness of the greatest number.

Supposing the state of the law in general were what it ought to be, and is commonly said to be, — on this supposition, by every wrong verdict — by every verdict not given in accordance with the state of the law and evidence, mischief is produced. If by any such verdict, not preponderant mischief, but preponderant good is produced, the case is of the number of those in which the state of the law is different from what it ought to be— and not merely different, but to such a degree different, that by the breach of the law, and that breach a notorious one, less mischief is done than would have been done by the observance of it.

To say, then, that in the present state of the law, taking the effects of this pretended unanimity in the aggregate, the result of it is beneficial to society, is as much as to say, that such is the state of the law, — taken in the aggregate, that society reaps a quantity of clear benefit from the aggregate number of the breaches of the law thus produced.

In this position is moreover included another, viz. that in the bulk of the population, at any rate in that part of it from which jurymen of the class in question are drawn, there exists such a regard for the welfare of the community, as, on the part of the class of those by whom laws are made, is not to be found. For if there were, then by repealing or giving the requisite modification to those laws, the breach of which is wont to be thus produced, the same effect would be made to have place, and without being accompanied with any abuse as is at present produced — an abuse so flagrant, and so plainly repugnant to the almost universally acknowledged principles of morality and religion.

Under the unanimity system, the usefulness of jury-trial is as the badness of the substantive law in general, and in particular the constitutional branch. This unanimity is therefore bad in the Anglo-American United States, but good in England.

Admitting the effect alleged, viz. the force put upon the will of all but one, by the one, and the substitution of the will of that one to the will of the other eleven, where, it may be asked, is the proof that by the breach of the law, — by the breach as thus effected, more good is commonly produced, than would have been produced by the observance?

Answer: No such effect can be produced, but by a more than common degree of energy. But setting aside the case of bribery, which could not without an uncommon concurrence of circumstances have place, and which in fact is very seldom, if ever, supposed to have place,—and the case of a sinister interest produced by other circumstances,—a case which in the penal branch can very seldom have place — the degree of energy requisite for the production of this effect can scarcely be produced by any sort of cause other than that, for the designation of which the name of conscience or principle is commonly employed; viz. sensibility to the force of social sympathy, sensibility to the force of the popular or moral sanction, or sensibility to the force of the religious sanction: an indifferentist will pin his faith on the opinion or the supposed opinion of the judge. In the case of neither of these classes is it common for any such energy to have place.

For marking the separation between the cases in which this unanimity may be of real use, and those in which it cannot be of real use, one line, or at most two lines, may suffice. It may be of use, and is of use, in all those cases in which, whether in respect of the prohibition, or in respect of the punishment, the law (being detrimental to the interest of the subject-many) ought not to be in existence, and that in such sort, that it is better for the subject-many that no obedience should ever be paid to it, than that no disobedience to it should have place. It is of use therefore in the case of all those penal provisions by which monarchical government is distinguished from democratical—in the instance of all those laws by which the penalty for offences against person, property, or reputation, is raised to a higher degree in the case where the injured person is a member of the government, than in the case where he is a private individual, possessing no share in the powers of government.

It is of use in all those cases in which punishment is attached to the divulgation of opinions.

It is of use in the case of all offences against the revenue of government, when the government is to such a degree corrupt, and to such an exten established in the habit of sacrificing to the particular, and thence sinister interest of its members, the interest of the whole community, that it would be for the advantage of the whole community that the government should fall to pieces, and a different one be established in the room of it.

It may even, without going to such a length as to annihilate the government, be of use to a certain extent, and on certain occasions; viz. by increasing the difficulty the govern-

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ment might be under as to the finding supplies: in such sort as to prevent the government from giving way on this or that occasion to that destructive propensity which in such governments has place on all occasions — the propensity to keep the country plunged in groundless and unnecessary wars.

If false declarations of unanimity, and torture for the compelling of the falsehood, are of use in this case, — give the benefit of the falsehood and the torture to all other cases in which unanimity would in some eyes be desirable.

Apply it, for example, to elections. Keep all the electors shut up together in close confinement, without food, and so forth, till they have given their votes in favour of one of the candidates: leaving the choice of the successful candidate to chance or wisdom, whichever may be most convenient. Not that, for giving extension to this supposed security for right conduct, there is any necessity for straying thus far from the so much admired pattern.

The twelve judges constitute a judicatory, and to complete the analogy, the number of the members is the same.* Take, then, this security for rectitude of decision, and apply it to the twelve judges. Not that in this case the need of it is in danger of being very frequent. Nowhere is it better known than in that pre-eminently learned assembly, how useful the appearance of agreement is to the giving, in the eyes of the deluded multitude, a colouring of reason and justice, to absurdity and injustice. On the occasion of those smotherings of evidence, by which impunity was given to the notorious crimes of Hastings, the twelve judges, under the tutorage of the head creature of the crown, were unanimous. The unanimity, which being capable of being declared, was declared, stood in the place of those reasons which, not being afforded by the nature of the case, were not to be found.

A case, and this too a law case, in which the demand for unanimity would naturally be more frequent, is that of the House of Lords. On the occasion, for example, of the Queen's trial, how much more acceptable a result might have been produced, had this security for propriety of decision been established in that most noble and august of all tribunals! A single peer, whose loyalty stood in need of recompence, while his constitution was hunger-proof, might have sufficed to have produced a result so much more desirable than that which took place.

When the perfection of judicature has thus been secured, secured in the House of Lords — one step more will secure perfection to legislation. For this purpose, the benefit of it must of course be extended to both Houses.

As soon as this instrument is subservient to right conduct in all those other and higher situations, so will it be in that of a jury: as soon, but not a moment sooner.

In England, one point of policy pervades and gives form and spirit to the system of government, and shape and effect to practice. It consists in confounding and obliterating throughout the whole field of government the distinctions between right and wrong: in such sort, that whatsoever would to any degree be wrong and flagitious, if practised by an individual not belonging to the class of rulers, nor commanded nor authorized by the appointed assortment of those who do belong to that class, becomes right and meritorious in the case of its being so authorized. For this purpose it is, that as often as any reason is undertaken to be given for this or that arrangement, forming part and parcel of the system of government, some manifest and flagrant falsehood (the more flagrant and absurd the better) is given and passed from hand to hand, as a sufficient reason for it, and justification of it. Thus, in speaking of an individual so situated that it is impossible for him ever to do right — that the whole of his conduct as such is occupied in the doing of wrong — that his very existence is one vast wrong — that by the maintenance of that one individual in the state in which he is placed, others, the most mischievous of whom is beyond comparison less so than he, are to the amount of many thousands destroyed by lingering deaths, and others, to an equally unlimited number, kept from coming into existence, — of this individual it is, that a phrase in every mouth ascribes the impossibility of doing wrong; and of this complexion, throughout the whole of the field, is the language which calls for prostration of the understanding and will, under the name of government; and in particular, of that which with a still louder voice calls for a still more abject prostration of those same faculties, under the name of justice.

To lies, in so far as applied to the purposes thus described, the name of fictions is given; and by this one denomination — such is the effect of fraud when backed by power — the character of wisdom and virtue is understood to be given to a mixture, in the composition of which it is difficult to say which of its two ingredients is predominant — absurdity or vice.

Ungrounded would be the imputation, if to the practice thus described any such adjunct as wanton were attached. In wantonness is implied thoughtlessness. But in this case, whatsoever part folly and imbecility may have had in giving increase to it, the deepest reflection, grounded on long experience and acute observation (all along keeping steadily in view the universal *actual* end of government — the greatest happiness of those who have borne a principal part in the exercise of it) must everywhere have

* The number has of late years been increased to fifteen.—*Ed.*

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borne a principal part in the original concoction of it.

Lest anything should be wanting to the efficiency of this policy, the force of the religious sanction has on this and all other favourable occasions been called in and added.

Thus it is, that for the converting into accomplices those who might otherwise have been tempted to become accusers, the whole multitude of individuals invested with the character of ecclesiastical functionaries have, as a condition precedent to their entrance upon that character, been (with exceptions too few to be worth taking into account), with anxious solemnity baptized in the filth of perjury.

By perjury is here meant, not anything that is criminal, — for effectual has been the care taken by the law that it shall not be criminal, viz. by the forbearing to render it punishable. By perjury, accordingly, is here meant — not any crime against the law, nothing more heinous than (not to speak of the offence against morals) a sin against God.

In some countries where polished minds bear sway — British India, for example — so rude, so uninformed, or so ill formed, not to say so deformed, is the general complexion of the public mind, that individuals, in number competent to the formation of juries, fit at the same time to be endued with the power ordinarily possessed by juries, would as yet, in the general mass of the population, be in few, if in any places, to be found. In hands so circumstanced, a function of such a nature as to apply, by the force of the legal sanction, a bridle to the power of the judge, could not be safely trusted — trusted with preponderantly useful effect. A power of such sure efficiency would in such hands be liable to be employed in the character of an instrument of depredation or oppression.

This being the case, it would not follow but that, operating with no other force than that of the popular or moral sanction, the function might in every instance be innoxious, and at the same time, in more shapes than one, serviceable. What is meant is, that — in cases of sufficient importance to pay for the complication, the additional delay, the vexation and the expense—under the respected name of a jury, a body of men should be introduced, appointed in some appropriate way, taking in that character cognizance of the cause, and delivering their verdict — delivering it, but to such effect, that the judge, though bound to hear it, and to hear it in public, should not be bound to conform to it; which being the case — in the event of non-compliance on the part of the judge — the effect of the verdict would be, that of an appeal from his decision to the tribunal of public opinion.

Independently of the effect of a verdict of this sort in each individual case upon the event of the cause, among the results of this practice, taken in the aggregate, would be the giving to each judicatory thus furnished, the character, as was before observed, of a school of justice —a school in which, while the individuals thus employed as jurymen were, upon the principle of mutual instruction, receiving their lessons in the character of scholars (receiving instruction thus in its most impressive shape,) the byestanders at large would, though in a shape not altogether so instructive, still be receiving instruction, not the less impressive and beneficial from its presenting itself to their conception in the shape of simple entertainment. Here would be a theatre: the suit at law, the drama; parties, advocates (if any,) judge, and jury, the *dramatis personæ* and actors; the bye-standers, the audience.

From the institution so modelled, another advantage — an advantage to social harmony on the part of naturally, and hitherto jarring materials, might be derived.

The body out of which, for each cause, the jurymen are drawn, be it supposed the sort of select and elected body above described. Of the elected Hindoos, let Mahometans be the electors; in like manner, of the elected Mahometans, the Hindoos; and as between religion and religion, so in the Hindoo religion, as between caste and caste.

In British India, suppose juries established, composed of natives: the case to a certain degree important, whether it belong to the penal, or only to the non-penal branch: the difficulty of preventing successful bribery would naturally be such as to put not only the ingenuity, but the perseverance of the legislator, to the stretch.

One expedient, in so far as the state of the population afforded an adequate mixture — a mixture of the two religions, Hindoo and Mahometan, in the composition of the jury, might afford some check: always supposed, the declaration of unanimity was not made requisite; for in that case the absolute command of the verdict is given to any one juryman whose perseverance is sufficiently paid for.

So far as Mahometans are concerned, the composition of this kind of jury presents no difficulty; not so, in so far as Hindoos are concerned. Even supposing Mahometans and men of other religions out of the question, among the Hindoos themselves the deplorable fancies by which differences in dignity and purity are imagined, as between caste and caste, present a labyrinth such as no distant eye can pervade to any such purpose as that of deciding what mixtures would, in such a case, be unendurable, what endurable.

Declaration of unanimity being necessary, suppose the individuals, of whom in the cause in question the jury will be composed, predetermined and foreknown: by making sure, though it were of no more than one of them, say, for example, by a bribe, a party might

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be sure of gaining his cause: a party whose all (the suit being a non-penal one) depended on the event of it, would seldom shrink from such a course. Enthusiasm, physically possible, but never to be reckoned upon, excepted,— in a cause where his life depended upon the issue of it, no man ever would shrink from such a course. In a certain state of society, public opinion and habits not being favourable to such a course, the pursuing it with success might be attended with more or less difficulty, even to such a degree as that the probability of it should not be great. But states of society might be found, and those too extensively prevalent, such as to substitute in this respect, to difficulty and improbability, facility and probability. In British India, for example, suppose a capital case: a jury composed of natives, the individuals known to the defendant by information, sufficiently early for such a practice, one juryman (though there were no more) needy, and the defendant's pecuniary means ample enough to pay the juryman's price, — impunity here is a matter of certainty.

CHAPTER XXIV.

SPECIAL JURIES.

A SPECIAL JURY is a petit jury, composed of members distinguished by opulence from those of a common petit jury.

This institution, a palpable innovation, a production of the last century, is of the number of those benefits for which the people of England stand indebted to the Whigs of England.

It had for its purposes and objects —

1. To assist in the destruction of the liberty of the press.

2. In revenue causes, to provide for the joint instrument of the monarch and aristocracy, in the situation of chief judge of the chief revenue judicatory, in the room of a bridle, — an instrument, and a cloak.

3. In all cases in which the interests of the ruling, the influential, and the opulent and consuming few stand in competition with those of the subject, the laborious and producing many,—to give to the few whatsoever facility could thus be given, by sacrificing the greatest happiness of the greatest number to that particular and sinister interest.

4. In all cases in which the interests, and thence the will, of the monarch and his instruments of all sorts, are in a more particular manner concerned, and in particular in Parliamentary election cases, to secure to the power of the monarch, by whose will, directly or indirectly applied, they always receive their situation, an instrument on which he might depend for giving execution and effect to that will, on all occasions.

5. To put an additional quantity of money into the hands of the lawyers.

The infusion of this poison into the frame of government was accordingly the fruit of a conspiracy between three parties — the monarch, the aristocracy, and the lawyers.

In all causes in which such is his Majesty's pleasure (cases of felony and a few others excepted,) his Majesty has a clear and uncontested right to a special jury for his jury; the party on one side has thus an incontestable right to the nomination of the judges.

An engine thus convenient — how happened it that it escaped being employed in cases of felony?

Under a form of government which has for its object the greatest happiness of the greatest number — that of the Anglo-American United States, for example — any limitation to the application of the investigative branch of procedure, to a power so necessary to good judicature in all cases, will, when once brought to view, be seen to be beyond dispute an imperfection.

Under a form of government which has for its main and characteristic object the sacrifice of the greatest happiness of the greatest number, to the particular and sinister interests of the members of the government and their adherents, it is, and to a vast extent, only by some imperfection less mischievous, that any security, how imperfect soever, can be obtained from more mischievous abuse. Under a form of government which has for its object the greatest happiness of the greatest number, the *laws* will (bating this or that casual misjudgment, oversight, or want of discernment) have that same end, not only for their object, but for their effect. With no other exception than the one just alluded to, it will, under such a government, be a result conducive to the greatest happiness of the greatest number, and thence a desirable one, that the execution and effect given to the laws should throughout be entire and uniform. Under a government which has for its object and effect the advancement of the sinister interest above mentioned, and thereby the continual sacrifice of the greatest happiness of the greatest number, it is to a certain extent, and that a vast and difficultly definable one, conducive to the greatest happiness of the greatest number, that the laws, such as they are, should to the greatest extent possible fail of being carried into execution and effect.

In a country thus labouring under the yoke of sinister interest, so vast will be the extent and mischievous tendency of those laws and arrangements, by which sacrifice is made of the greatest happiness of the greatest number to that sinister interest,—that rather than full effect should be given to this disastrous class of laws and arrangements, it is conducive

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to the greatest happiness of the greatest number, and thence clearly and eminently desirable, that the whole frame of the laws and government should labour under a degree of general imbecility and inefficiency as effective as possible.

The laws and other arrangements by which the liberty of the press is sought to be suppressed, having for their object, and if carried into effect, their sure effect, the obliteration of those few, imperfect, and ever precarious shades of distinction, by which the limited is distinguished from a pure monarchy,—it were a lesser evil that crimes of all sorts should abound still more than they do, and juries give false verdicts still more frequently than it is endeavoured to make them do, than that the designs and endeavours against that vital security should be accomplished.

Under a government which has for its object the greatest happiness of the greatest number, official frugality is an object uniformly and anxiously pursued: peace, were it only as an instrument of such frugality, cultivated with proportionable sincerity and anxiety: any want of effect given to the laws, by which contributions are required for the maintenance of government, universally felt and regarded as a mischief: all endeavours employed in the evasion of them regarded as generally mischievous, and as such punished, and with full reason, by general contempt.

Under a government which has for its main object the sacrifice of the greatest happiness of the greatest number, to the sinister interest of the ruling one and the sub-ruling few, corruption and delusion to the greatest extent possible, are necessary to that object: waste, in so far as conducive to the increase of the corruption and delusion fund, a subordinate or co-ordinate object: war, were it only as a means and pretence for such waste, another object never out of view: that object, together with those others, invariably pursued, in so far as the contributions capable of being extracted from contributors, involuntary or voluntary, in the shape of taxes, or in the shape of loans, *i.e.* annuities paid by government by means of further taxes, can be obtained:—under such a government, by every penny paid into the Treasury, the means of diminishing the happiness of the greatest number receive increase;—by every penny which is prevented from taking that pernicious course, the diminution of that general happiness is so far prevented.

As, under the one government, every man, in proportion to the regard he feels for the greatest happiness of the greatest number, will give his strength to the revenue laws, and set his strength against all endeavours employed for the evasion of them,—so, under the other sort of government, in proportion to the regard he feels for that same object, will he set his strength against the laws, and in support of all endeavours employed for the evasion of them. Thus in particular, and so in general. In so far as the laws have been made every man's enemy, every man in defence, not only of his own happiness, but of the happiness of the greatest number, will, in desire and endeavour, be an enemy to the laws

CHAPTER XXV.

GRAND JURIES.

In the name Grand Juries, the name of juries being included, the appendage thus denominated cannot be altogether passed over in silence.

A grand jury is a superior kind of jury. A grand jury has for its characteristic and peculiar function the salvation of the innocent.

A jury is a good thing: a grand jury is a jury: *ergo*, a grand jury is a good thing.

A jury is a useful thing: a grand jury is not only a useful, but an honourable thing; for a grand jury is a grand thing.

Such being the logic (this logic not being altogether clear of fallacy,)—to counteract the influence of it, it is necessary to show what sort of a thing a grand jury really is.

A grand jury is a bar to penal justice. For whatsoever purposes originally set up, it has been kept up, and employed by the sub-ruling few, under the influence of the ruling one, for the securing to them and their adherents the benefit of impunity, on the occasion of any misdeeds committed by them, in the course of the sacrifices made by them of the greatest happiness of the greatest number, to their own particular and sinister interests.

The petit jury tries a man, and either acquits or convicts him: the grand jury either refuses to put him, and thus prevents him from being put, upon his trial, or puts him upon it.

A petit jury is composed of twelve, neither more nor less; whether it be for acquittal or for conviction, a declaration of unanimity, true or false, no matter, is necessary for the effectuation of it: a grand jury consists of twenty-three; of that number any lesser number, so it consist of twelve, is necessary, and sufficient to give validity to what is done.

Of the procedure before the petit jury, a characteristic and indispensable property is publicity: of the procedure before the grand jury, a property still more characteristic and declaredly secured, is secresy: the ceremony of an oath is employed for the securing of it; in the official oath exacted from grand jurors, the promise of secresy constitutes a distinct article.

The function of the grand jury applies itself to two different classes of offences: to felonies and to misdemeanours.

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Viewed at a distance — viewed in a general point of view — the division into felonies and misdemeanours corresponds in the main with the above exhibited division into penal cases, which are such by reason of aggravation, and penal cases which are such for want of an individual specially injured.*

Of the power originally given to the grand jury, the effect was, that without its fiat no operation of judicature, at the expense of the personal liberty of an individual suspected, could lawfully be performed: it had thereby a veto on such operations; preservation was thereby given to the personal liberty, and by means of the oath of secresy, to the reputation of individuals. In latter times, however, this security, with the effects, good and bad together, which could not fail to be attendant on it — this security, the name and power of the grand jury notwithstanding, has in both those shapes been at an end: on application by any individual, by a warrant from a single local magistrate, styled a justice of the peace, appointed and removable at any moment by the monarch, any man is on this occasion committed to prison; there to remain, or thence to be liberated, according to the discretion of the magistrate; unless, and until his liberty be disposed of by some other authority, not here to the purpose.

Those effects which are composed of evil, with little or no admixture of good, remain in full force behind. For example, the power by which, for crimes of the most extensive mischief, by a knot of men themselves armed with complete impunity, without danger so much as to reputation (reputation being covered by the oath of secresy,) impunity is secured to criminals, in any number, at pleasure.

In so far as what legal security there is, against offences by means of which, by men of this class (viz. the class of the sub-ruling few acting under the influence of the ruling one,) sacrifices are made of the greatest happiness of the greatest number, to the particular and sinister interests of those same rulers, is given by the punishment and mode of procedure applied to the misdeeds styled felonies, — impunity and complete licence is thus accorded. For anything or for nothing, put men to death in any numbers: if, according to the view of this section of the aristocracy (instrument and confederate of the monarchy,) it is for the advantage of those conjunct interests that the men should die, you are safe. You are secured not only against punishment,—but, in so far as under the same influence, the same inclinations prevail in that class of the instantly-removable agents of the monarch, styled justices of the peace, — from disrepute. So much as to felonies: those cases included, which, though not in denomination, are, in respect of punishment or investigative procedure, or both, dealt with as felonies.

Now as to misdemeanours. Cases in which with some exceptions, principally regarding offences against the persons of individuals, investigative procedure has not been provided:

In so far as investigative procedure is suffered to take place, whatsoever protection is afforded against punishment at the hands of law, does not extend altogether to disrepute: the grand jury, when it has given to its instrument and accomplice security against punishment, has not of itself — has not, without the concurrence of a sufficient assortment of other accomplices, in the situation of justices of the peace, together with an appropriate suppression of the liberty of the press, given him security against disrepute. In the cases to which investigative procedure has not been extended, the security afforded to misdoers by the power of the grand jury is more entire.

Whatever it may have been at one time, as matters have stood for a long time, a grand jury has been, is, and will be, an instrument much worse than useless: it gives no protection to the subject many against the ruling one, or the sub-ruling, opulent, and the influential few; it does give protection to the ruling one — to the sub-ruling, opulent, and influential few, against the subject-many.

Bill found by the grand jury, information grantable by motion, information filed *ex officio* for alleged offences against person, property, or reputation: of all these three inlets to prosecution and trial, the one and the few have their choice: against the subject many, in any contest they may have with the many or the few, all these inlets to justice, or the show of it, are closed: information on motion, by want of opulence on their part; information *ex officio*, by want of power.

Vain altogether is the pretence that in this power you have a protection, that innocence has a protection, against unjust prosecution — a protection set up at the very threshhold — a protection against preliminary imprisonment.

If this protection were a preponderantly useful and desirable one, how much more so would it be in the case of felonies, than in the case of misdemeanors! — in the case in which you have taken it away, than in the case in which you suffer it to stand!

As at present constituted, a grand jury is an assembly composed exclusively of gentlemen: gentlemen to the exclusion of yeomen. In the vocabulary of English jurisprudence, these denominations have an import which, if not altogether determinate, is at least meant to be so. The class of gentlemen, is the class of the sub-ruling, the opulent, the influential few; the class of yeomen is the class of the

* All common assaults on individuals, are classed under the title of misdemeanors.—*Ed.*

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subject many. On this occasion, if the greatest happiness of the greatest number were the end in view, in the composition of this transitory body, the majority should be of the class of yeomen; for if some must be sacrificed, better the few to the many, than the many to the few: not that any such sacrifice would have place.

If any regard were paid, so much as to the appearance of equal justice, there should be a mixture of both classes, and the class of the few should at any rate, not have a majority, as against the class of the many.

CHAPTER XXVI.

QUASI-JURY.

§ 1. *Preparatory or preliminary observations.*

THE design in the use here made of a jury, — that is to say, of a sample taken at random of the promiscuous multitude — the design is not to invest a set of men so circumstanced, with an arbitrary power over their fellow-countrymen; but to add to the effective force of the other checks applied to the power of the judge. On the part of such an assemblage, no one element of appropriate aptitude in any degree above the lowest could reasonably be depended upon: on a judge placed in a situation fenced about as here — on a judge, in so far as on any person invested with such power as it is necessary to arm his situation with, so long as the eye of the public-opinion tribunal is kept steadily fixed upon him, dependence may be placed.

Accordingly, they are not merely authorized, but invited and urged to take cognizance of every matter that comes before them, and on whatever occasion, or on whatever account they feel disposed: whether for the purpose of assistance to the understanding, or controul upon the will of the judge, — to give expression, collectively and individually, to their sentiments. But this opinion is not made obligatory on the judge — it is not made decisive of the fate of the cause.

By this means, instead of being placed on shoulders too lowly situated to be depended upon for being duly sensible to the pressure of it, the responsibility is left to press with all its weight upon those shoulders in which that tutelary sensibility is at its maximum.

By the registration made on each occasion of the opinion of the jury on the one hand, and the opinion of the judge on the other, compared with the nature of the case (and this parallelism continued on throughout the stream of time,) a continually accumulating body of information, interesting in a variety of ways, will be secured: the progress of intellectual aptitude, as applied to matter of law and evidence, will be marked by it.

The judge will not, as he would otherwise, partly by the intellectual influence attached to his situation, or by fallacies and other artifices employed on purpose, have it in his power to remove from his own shoulders the just odium that would otherwise be brought down upon him by an unjust decision.

On the other hand, while in this direction, on account of its dangerousness, the influence of the committee of the public-opinion tribunal is here limited,— in another quarter, an enlargement clear of all danger is given to it. From an opinion which is not obligatory, evil cannot in any part of the field be in any shape produced. And in the situation of judge, if a check is necessary or useful in any part of the field he travels in, so is it in every other. Of a road, such as that here in question, if a watchman be useful in any one part, so must he be in every other: accordingly, under the system here proposed, in no part of his career is the probity of the judge left destitute of the benefit of the safeguard which it belongs to the power of the quasi-jury to afford. Of whatever point a judge has cognizance, of the same point a quasi-jury has concomitant cognizance.

Of the service, such as it is, which is rendered to justice in systems in which the word jury is employed, it may be questioned whether it be in a direct way, or otherwise than in an indirect way, that upon the whole the greatest part of it is rendered. Along with the jury, a portion of the public has all along been let in. The jury itself forms on each occasion a part and parcel of the great public at large; and in proportion to the change made in the persons by whom that function is performed, that portion receives enlargement. Hence it is, that in jury cases publicity of judication has been to a considerable extent, though nowhere in an all-comprehensive, nor therefore in an adequate extent, the practice: being the practice in those cases, the expectation of finding it so wherever it has been the practice, has become general: and in this indirect way it is, that jury-trial is, to an extent more or less considerable, of use in cases in which, as to the affording any binding check upon partiality on the part of the judge, the jury itself might be little better than useless. Witness all those cases in which the choice of the jury is immediately or unimmediately in the hands either of the judge or of some other dependent creature or creatures of the monarch: in all such cases, it may be a question whether, in the character of a check to improbity in the judge, it does more good than it does evil.

Not only has the public at large acquired the habit, and thence to a practical effect the right, of stealing in as it were under the cloak of the jury; but by the power given to the jury, the judge finds himself under the necessity of addressing his discourse to

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them, explanatory of the nature of the case and of the grounds on which his advice and recommendation, if any is given to them, has been founded. Suppose, then, for argument's sake, an advice manifestly repugnant to justice given by him to them — what is the consequence? If he gives no reason, he does not give himself the chance he might have of prevailing by sophistry; and the injustice being without a mask, instead of compassing its object, will expose him to just reproach: if he gives reasons, their being by the supposition weak, they will expose him to reproach by their weakness.

Now as to the number of the persons whose services are to be exacted for the performance of this function. On this part of the field, a conflict has place between the direct ends of justice on the one part, and the collateral ends on the other; between the good attached to the degree of security afforded against the evils of misdecision, and the evil composed of vexation to these functionaries, and expense either to them or to the community at large.

True it is, that in regard to extent, proportioned to the vexation and expense is the instruction, moral and intellectual, thus spread over the community: but in regard to the vexation, the quantity is much more palpable, than of the quantity of instruction reaped, the existence will be certain.

Of these several quantities, any estimate approaching to adequate correctness is impossible, unless the political state in question is given. The pecuniary sufficiency of the individual, the state of the communications, being given, and the length of attendance being given, the quantity of the vexation will depend upon the length of the journey to and fro; that is, on the distance between the abode of each individual and the judicatory. But the political state in question being given, the average of this distance will be inversely as the number of those judicial subdistricts or portions of territory resulting from an ulterior division.

Thereupon comes a question, — Shall these assessors be taken from every part of a subdistrict without distinction? or from a portion, no part of which is by more than a certain length remote from the judicatory? If without distinction, then comes inordinate vexation to those whose habitation is to a certain degree remote: if with distinction, in consequence of which, to those beyond the line, an exemption is granted, then is the population of the sub-district divided into two portions, the one of which is left in a sort of barbarous state in comparison of the other.

On an occasion such as this, a middle course might perhaps be taken, not without advantage. In the remote parts, the times of service might be less frequent than in the near part: the vexation, however, is in this case not done away with, only lessened; and the instruction is in the same proportion lessened.

Increase the number of those subdistricts, with those judicatories, — this vexation is indeed lessened, but the expense to the public is increased.

Under the division into subdistricts, shall there be any subordinate division — a division of those subdistricts into his-subdistricts?

Answer: For the purposes of judicature, No. The extraordinary case of an appeal to the justice minister will answer every good purpose, of a greater number, and put an exclusion upon all the bad effects.

In the case of assessorship service, the time of demurrage, it may be observed, will naturally be considerably longer than the time of election service. For the election service, it may happen to be performed within the first minute; and the time requisite for receiving the vote, by dropping two recognized pieces of card into a box, can never, for all the votes taken together, be extended beyond the bounds of a single day.

The expense of the assessor while in waiting, — shall it be borne by the individual or by the public? On the individual, the burthen would be intolerable and needless: by the whole public the benefit is reaped; by the whole public ought the whole burthen to be borne. For functionaries of this class taken separately, the pay necessary will be to the lowest amount: nothing is there that could render it worth regard, but the number of those whose services are thus put into requisition. The bulk of the population being in almost every country composed of the lowest paid day-labourers, it will be composed of those to whom any casual deduction from the means of subsistence would be most irksome, and be most difficult of endurance: the pay should therefore be somewhat greater than that of the lowest paid day-labourer; say, for example, twice as much. Thus much for the assessors taken from the more numerous class.

In the case of the assessors taken from the more erudite class, the quantum, it should seem, should not be exceeded. By no addition that could be made to it, could any degree of proportionality — of equality, be maintained. On the plea of increase, it would require to increase with the amount of income; but to this mode of increase, the objection seems a peremptory one: publication of income would in general be irksome; nor could any correctness be given to the fixation without such an inquiry as would be the equivalent of a lawsuit. Nor to the more numerous class would any such gradation appear consistent with justice. In comparison with that of the more numerous class, the condition of those members of the more erudite class would, on the

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face of the account, be seen to be in the same proportion more prosperous—the general mass of benefit derived from the government so much the greater: and proportioned to the benefit should therefore be the burthen, or justice and equality are obviously contravened.

Were the pay of an assessor ever so much greater than it is proposed to be, still it could not be, in the instance of every individual, in every conjuncture, an equivalent for the attendant vexation. Here, then, may be seen a reason for the permission of a substitute, in the room of any person on whom the lot has fallen — a substitute, on the condition that whatever be the qualification requisite in the case of the principal, that which is requisite in the case of the substitute shall be the same; namely, as here proposed, possession of the arts of reading and writing.

§ 2. *Quasi-jury, what.*

The denominations quasi-jury, and quasi-jury system, are here necessitated by irresistible considerations. By the word jury, the nature and design of this portion of a judicatory, some conception, however inadequate, is presented to view, and a general prepossession in favour of it will naturally be produced. At the same time, if without some intimation given that the two objects, how nearly soever related, want much of being the same, great would have been the confusion and perplexity introduced by the discrepancy between the denomination, and the thing thus denominated.

The institution called a jury, being the subject of such general applause — why on this occasion introduce not a jury, but a quasi-jury? not the thing itself, but only an institution bearing more or less resemblance to it? Conceived in the most general terms, the answer is—Because with this resemblance how faint so ever — with this faint resemblance, in addition to the other securities which have been seen, for appropriate aptitude on the part of the judge, all the good effects that have ever been looked for in a jury are produced, free from all the evil effects — evil effects essential and unpreventable, and to such a degree evil, as to render the use of it altogether incompatible with a system of procedure having for its end the ends of justice; inasmuch as it is in a high degree adverse to, and the use of it incompatible with, the attainment of every one of those ends. What, then! have its effects been from first to last, wheresover employed, no other than so much pure evil? Answer: On the contrary, they have been productive, as has been already shewn, of inestimable good. But in what manner? — By this, and this almost alone; namely, by the very opposition of the institution to the main end among the ends of justice: that same main end being rectitude of decision, exclusion of misdecision.

On looking to the several elements or features of appropriate aptitude, it will be seen that, in the aggregate, jurors are essentially wanting: for appropriate moral aptitude there being, in a body of men so taken, no security; and in lieu of appropriate knowledge and judgment, there being a constant certainty of the opposite inaptitude — of inaptitude absolutely considered, and of inaptitude considered in comparison of the like quality in question, on the part of the judge.

Judication is a branch of art and science. In the most unapt judge ever seen, some proficiency in the art and science has been manifest: on the part of those men, who, to be least unaptly selected, must be selected at random, selected by fortune, not any the smallest security for any the least grain of any one of the elements of appropriate aptitude can be pointed out.

Of the institution here proposed, the object is to bring to pass, with some addition, whatever has been looked for at the hands of a jury.

If in any one state of society it be capable of answering its intended purpose, so will it in every other; for in the organization of it, a state of society, one at the lowest as well as one at the highest stages in the course of civilization, has been all along kept in view.

Taking up men from the most numerous class, and placing them in a situation in which the business of life in all its forms will be brought before their eyes, and a call made upon them for whatsoever exercise they are capable of giving to their intellectual powers — converting the judicial theatre into a school of justice, into which men of all ranks are compelled to enter themselves — it tends with continual increase to give strength to the aggregate stock of intellectual power throughout the community, and with continually augmented effect to render more and more apt those whom it finds least so.

At the same time, giving no decisive effect to the expression of their sentiments, it avoids altogether the exposing the welfare of the community to hazard from any ill-advised or perverse exercise of power, of which in that situation of life the will of men may be supposed susceptible: they may advise anything; they can give determination to nothing. For anything which they are allowed to do, or are at all likely to do, no evil is there in any shape which the community is exposed to suffer.

While at their hands society is not exposed to evil in any shape, — on the other hand, by the part which it is given to them to act, the quantity of evil which society would otherwise be exposed to suffer at the hands of the judge, great as may be the influence which they are enabled to exercise, — by no power given to

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them, can responsibility on the part of the judge experience any the slightest diminution: on him, in every instance of whatsoever is done, the responsibility rests in all its undiminished weight.

The object has been to strew the way of the judge with such checks as, while they afforded no impediment to him in the right and proper course, would, when taken all together, be found to oppose an insuperable impediment to him as often as it could happen to him to make any such attempt as that of straying into any sinister course.

The course by which efficiency will thus be found to have been so perfectly established, is as simple in its description as in its contrivance. To the quasi-jury are given all the powers of judication — all the powers that are given to a judge, with only one exception; namely, the effectively imperative function — the function to the exercise of which is attached the power of giving execution and effect to the will of him by whom it is possessed: and this is the only one by which in any hands mischief can be done. Of themselves, nothing can they cause to be done: of themselves, nothing can they so much as prevent from being done. This power, in the shape in which they possess it, resembles in some degree what in mechanics is the power exercised by friction, — it is like the drag upon the wheel.

§ 3. *Quasi-Jurors, who, and how chosen.*

Hitherto there has been unavoidably more or less of the fictitious, in the idea attached to the appellation of committee or sub-committee of the public opinion tribunal: the members being self-appointed, not mutually present unless by accident, and fluctuating. But in the case of a jury, everything said of such a sub-committee is or may be realized: it is everywhere, or may be, and (at any rate to fulfil the professed ends of it) ought to be, an exact sample of that unofficial judicatory, although to the particular purpose in question, officialized.

From this source may be deduced what ought to be the principal and characteristic features of this fragment of an official jury, thus denominated: —

1. Stock from which the members are taken, — for securing appropriate moral aptitude, the whole of the male adults of the community; unless, for the better securing of appropriate intellectual aptitude, it should be deemed advisable, as in case of election of representatives, to confine the capacity, to those who have been found capable of undergoing a literary test. Object of this universality, exclusion of aristocratical injustice.

2. Locator of these ephemeral judges,—not *choice* but *chance*. Chance alone is sure to be impartial: chance alone is incorruptible. To place the choice in any human hand, be he who he may, is to lead him into needless and useless temptation — to infuse the poison of corruption into his veins.

By this means, and by this alone, as all danger, so all suspense and apprehension of partiality, stands excluded.

3. Being by supposition exempt from all corrupt interest, the suffrages given by these unpermanently official judges, may without inconvenience be covered with a veil of secresy: having no particular and sinister profit to gain by injustice, the course taken by each will be determined by his regard for that interest of his, in which he has for sharers all the other members of the community, — in a word, for that interest which is in each case on the side of justice. The eye of the public might in this case be even prejudicial to the cause of justice; for in the public might be this or that individual, by whose corruptive influence might be created in the breast of this or that juryman a particular and sinister interest, by which would be dictated and produced a decision and correspondent suffrage opposite to the decision dictated by a regard for the rules of justice, — and by reason of this opposition, opposition to the universal interest.

§ 4. *Expunction.*

Challenging, — that is, the partial dislocation of proposed jurors by a party — why not here employed?

Answer.—Reasons: 1. The vast aggregate body of vexation. By the provision made to that effect, vexation in extent and in intensity not inconsiderable.

2. Under the here proposed system, no such demand for the provision has place as under the existing system in England: the decision of the jury being in English practice obligatory on the judge; in the here proposed practice — not.

3. The decision not being obligatory, the demand for exclusion has no place. But the effect intended by exclusion, is here produced to much greater extent without exclusion — namely, by the questions which the parties on both sides are allowed to put to the several jurymen, for the purpose of ascertaining the existence or non-existence of a natural cause of partiality, and thence the probability of the effect. Be the answers what they may, the juryman is not inhibited from taking whatsoever part he feels disposed to take throughout the business. From his answers, the state of his mind in respect of partiality and impartiality is open to be collected: in case of apparent cause of partiality, it operates in diminution of the weight of his authority — just as, in the case of evidence, in diminution of the probative force of the testimony of the witness.

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4. By the omission of this institution, no small mass of complication is discarded.

§ 5. *Quasi-Jury, uses of.*

In respect of scientific, judicial, and active aptitude, it is here a sort of assumed postulate, that a set of men taken at random from the body of the people can never be regarded as being, by a great deal, upon a par with an erudite and experienced official judge.

The use of any such assessor is therefore merely confined to the contributing to the securing of adequate appropriate moral aptitude on his part, by the application of a check to the exercise of his powers.

In this capacity they are capable of serving, and may reasonably be expected to serve, independently of any degree of intellectual aptitude on their part, and therefore with as low a degree of aptitude in that shape as ever can have place. Why? The reason is, because their persons being unknown to him, the degree of aptitude actually possessed by them will be unknown to him. They may, every one of them, for any assurance he can have, be endowed with the very highest degree of appropriate aptitude in every shape.

What remains is, to secure on their part, as far as may be, appropriate moral aptitude in the shape and degree requisite.

The first quality to be provided for is — original impartiality.

The next is uncorruption. As to uncorruptibility, this depends on the particular frame of mind on the part of each individual, — a sort of fact in relation to which no adequate information can, in the nature of the case, be attainable.

What remains is — in presumption of corruptibility, to throw such difficulties as can be thrown in the way of the sort of intercourse necessary to the production of the noxious effect.

Without his putting himself in a considerable degree in the power of the person tempted, no person can in any such case apply temptation to the probity of a quasi-juryman.

The smaller and less certain the corruption derivable from success in the enterprise in question, the less the probability of a man's exposing himself to such hazard.

Of the body of assessors styled a quasi-jury, the use is, as has been seen, to add to the mass of securities for appropriate aptitude on the part of the judge. In this character, its operation is mostly confined to the moral branch of that same aptitude: to the degree of his appropriate intellectual and active aptitude, it cannot be expected to make addition, any otherwise than in so far as it contributes to call forth into action whatsoever stock of those desirable qualities it finds him in possession of.

To the power given to the body styled in English-bred law a jury, these same uses and good effects are attributed: and lest they should not be produced, a certain portion of the power of this erudite functionary is taken from him and conferred on those unerudite functionaries.

If at their hands, in comparison with him, any superiority of appropriate aptitude is in any branch looked for, it must be in the intellectual branch, — to wit, knowledge, for example, of the feelings of individuals whose condition is nearer to them than his: together with such casual acquaintance as it may happen to them to possess of the particular circumstances of the individuals on whose cases they have to pronounce.

Consideration had of the mass of securities provided, of which the maximization of publicity, and the effectual dislocability of all judges by the real representatives of the people, are the chief, — it will, it is believed, be sufficiently manifest, that without either jury or even quasi-jury, the securities for good judicature would be much more effectual than, by anything that can be called a jury, they ever have been made, or ever can be, anywhere. But forasmuch as, by the institution as here modified, a substantial addition seemed capable of being rendered to the efficiency of these same securities, this ingredient in the mass of appropriate arrangements could not consistently be withholden; not to speak of the wishes and even expectations which on this head the public-opinion tribunal could not fail to entertain.

The comparatively slight particular above alluded to excepted, only with a view to moral aptitude could any additional security be looked for at the hands of men so circumstanced.

The controul applied by a body of judicial functionaries to the conduct of the judge cannot be adequately effectual, unless it applies to every step taken by him in the course of the suit, from the commencement to the close. Such is that applied here in this code by the quasi-jury. Nothing approaching to it is that which is applied by the English jury. In a large proportion of the whole number of suits, that body has no place: and among them are those which arise out of the most important cases; and those which have place in by far the greatest number: the most important, — those, to wit, which give employment to the equity courts: those which have place in by far the greatest number, — those, to wit, which give employment to the small-debt courts.

Now as to the concomitancy of the controul of the jury with the operations of the judge. Out of an indefinite number of stages of operation, it is confined to a single one called the trial. But whatsoever would have

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been the opinion and will of the jury, had the suit throughout the whole course of it been open to their influence, the judge may frustrate altogether: visibly, by operations concomitant or subsequent to the trial; invisibly, by operations anterior to it; and, upon the whole, in each case, by any one of a multitude of operations. In cases styled penal, the power of the jury is not quite so inefficient as in cases styled civil. In cases styled civil, the judge can in one way or other give success to the plaintiff's or to the defendant's side at pleasure. Not exactly so in cases styled penal. To the defendant's side, indeed, he can insure success, on any one of an infinite variety of devices, not one of which bears any the slightest relation to the justice of the case. Not quite so easy is it to give success to the plaintiff's side; — in other words, to punish, under the name of punishment, the defendant for a crime which, in the opinion of a jury, he has not or would not have been regarded as having committed. It can no otherwise be done than under accidental circumstances favourable to injustice in this shape; for example, by refusing the operations necessary to the obtainment of evidence, by which, if obtained, a just acquittal would have been produced.

The primary use there, is the forcing out of the mouth of the official judge, grounds and reasons for the decision which it is his desire should have place.

Fortunate is the state of things where the success of an operation is independent of the qualities of the individual operators. In this case is this primary benefit attached to the institution of a jury.

For whatever reasons the conduct of the judge should be subject to inspection in any one part of the procedure, — for the same reasons, so ought it in every other: for if by aberration from the course of justice, it is in his power to produce misdecision, or the collateral evils of needless delay, vexation, and expense in any one part; so is it in any other. Admitting then that the use of a jury consists in its exercising, and being seen to exercise, the function of an inspector of the conduct of a judge, the presence of this safeguard is useful, not to say necessary, from the very commencement of the procedure in the presence of the judge, to the very end of it. In the early days of jury-trial, it seems not improbable that this undiscontinued inspection actually had place: in the jury-court, as now in small-debt courts, commonly the same day, not unfrequently the same hour, which saw the commencement of a cause, saw the termination of it. The splitting of a cause into an indefinite number of parts, with long intervals between part and part — the jury not being admitted to be present at more than one of those parts — and a contrivance, by which the decision pronounced in their presence was overturned in their absence; — all these improvements in the art of fee-gathering were so many subsequent amendments introduced by degrees. Had the ends of justice been the object, the application made of this system of inspection would have been commensurate with the need of it; but the ends of judicature were the augmentation of the emolument and the power of the judge: hence the difference. In the best judicatory that could be framed — to wit, a single-seated judicatory — a judicatory in which a single judge presides, whose situation is permanent, and his functions exercised with open doors, — there being no person in particular who had any claim for reasons or explanations, for any of those statements by which a test of his appropriate aptitude in all its several branches is afforded, — arbitrary power would find itself in a state of comparative ease. Suppose a judge in any instance determined to pronounce a decision, of the unjustness of which he is conscious, what is the course that would be free for him to take? After hearing what is offered to be said on both sides, he will pronounce his decision. No sufficient reason, — the case (by supposition) not affording any, — will be seen for it. In this case, will any loss of reputation be the consequence? Not by any means a certain consequence. The prepossession which the power attached to the situation insures in favour of everything that is done in it, is an assured protection, and in a multitude of minds a constantly effectual one.

For the cognizance of a claim which must not exceed 40s., the attendance of a numerous body of judges, under the name of commissioners, is not grudged: of these commissioners the list being the same at all times. Still less need it be grudged, for claims of forty hundred or forty thousand pounds: the labour of attendance on the part of these inspecting judges being relieved by an indefinite frequency of change. If by the now established number of 12, the extent given to this burden would be rendered too great, scarcely can any reason be assigned why it should not be lessened: 11, 9, 7, 5, or even so few as 3, chosen upon a right principle, would be preferable to 12, all chosen upon a wrong principle.

In comparison of the power possessed by a juryman, whether under the English or the French system, how small is the power here given to a quasi-juryman, is altogether obvious. The quasi-jury all together, not having any obligative power, further than the enabling a party to appeal, — silencing their interposition, silencing the communication of their observations, is the upshot of all that corruption can do in this case. And unless in the cases where without such interposition the judge would go wrong, while by the check

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applied by it he will be restrained from going wrong, and confined within the path of rectitude,—in no shape would any advantage be to be gained by the production of any such corrupt silence.

Of an institution beneficial upon the whole, concomitant with the beneficial effects are always an infinite multitude of uninfluencing circumstances, and, though in less number, obstacles, or opposing causes on every occasion: the great difficulty is to distinguish from each other these three classes of circumstances.

Of the beneficial effects of the institution of a jury, some apply alike to both branches of substantive law—the penal and the non-penal; others exclusively or more particularly to the penal.

Those which apply alike to both branches may be stated to be as follows:—

The main and all-comprehensive beneficial effect produced by it, in the several cases to which it applies, is the bringing to bear upon the decision the power of the public-opinion tribunal—a power which, in so far as it has place, applies itself to the most despotic governments, and diminishes more or less the evil which they have for their inseparable result.

This it does in three different ways.—

1. One is through the medium of *publicity;* the sort and degree of the publicity which it gives to that part of a suit to which it attaches itself; and that part is the principal one. The jury will form of themselves a committee of the public-opinion tribunal; and from its several members the information respectively possessed by them radiates out of doors through so many circles of indefinite extent, of which they are respectively the centres.

This being the most extensively favourite mode of judicature, the habit of publicity inseparably attached to it has extended itself to the several other forms. And sure it is that jury-trial has been a main security for the power of the public-opinion tribunal as applied to judicature.

True it is, that from the earliest times of which any accounts remain to us, a high degree of publicity has had place in judicature, and in times anterior to those in which the institution of a limited number of assessors, under the name of a jury, appears to have been in use. Witness the county courts and the courts baron. It is not therefore for its creation that the practice of publicity is indebted to jury-trial. It is so, however, for its preservation, and it forms accordingly the characteristic difference between English-bred law and Rome-bred law.

This publicity, with its advantages, exists in a state independent of jury-trial: it exists, as we have seen, where there is no jury-trial; for example, in the judicatories called equity courts, and in the judicatories called ecclesiastical courts, not to speak of the military courts in some instances.

In the account of beneficial effects, this, then, it may be seen, is distinct from that of the obligatory power possessed by the jury over the decision in all hitherto established instances; and may accordingly have place without it.

2. Another way in which it brings to bear upon judicature this same tutelary power, is by the obligation it imposes upon the permanently-official and all-directing judge, to pay his court to these his transitory colleagues, and submit to them, and through them to the public-opinion tribunal at large, in the form of reasons, whatsoever considerations he regards as necessary to the engaging them to pronounce a decision conformable to his wishes.

In this way, not only if the decision he wishes to give is unjust, but the injustice of it is to a certain degree manifest, exposure to public reproach is a consequence which it cannot be altogether in his power to exempt it from: the exposure is in this case effected either by the utter absence of all attempt at exhibiting reasons, or by what may be still better, the weakness and absurdity of his reasons.

These good effects are, it is manifest, both of them altogether distinct from the powers exercised by the jury in respect to the nature and effect of the decision. It is here accordingly meant to be preserved.

3. Another distinguishable mode in which the jury system, in the form in which it is in use, has been conducive to the ends of justice, is the causing evidence to continue to be received in the best shape; namely, that in which it passes immediately from the lips of the relating witness to the ears of the judge and the surrounding auditory, without being strained through the hands of professional or official instruments, or both, and then reduced to writing by them, they being paid all of them at the rate of so much a word for extracting it.

Neither is this feature inseparable in its nature from jury procedure. Neither in this instance is there anything in the nature of evidence on the one hand, or of jury procedure on the other, that renders it more difficult to receive evidence in this shape, in any other sort of judicatory than in that of which a jury forms no part. In relation to a fact open to dispute, no judge, no other ruling functionary that really wished to come at the truth, ever thought of receiving evidence in any other shape than in the orally delivered shape, whenever in this shape it was within reach. Witness all parliamentary inquiries: witness every father of a family in his dealings with his children or his servants: witness

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the inquiries carried on, on the occasion of those crimes by which the minds of individuals, governors as well as governed, are apprehensive of injury done to person or property.

But except in so far as the truth was regarded as conducive to the giving effect to his power, or to that of him on whom he was dependent, no functionary concerned in the framing of the rules of procedure does ever harbour any such wish, as that of seeing the truth come to light, or enabling his associates and successors to come at the truth. Their aim has uniformly been, as it could not but be, to extract out of the pockets of suitors money in the greatest quantity in which it could be so extracted. The object was, that in testimonial statements the quantity of falsehood should be maximized—that further proceedings and further writings for the exposure of it might be necessitated.

At the time when the course of procedure with jurors in it was settled, and had assumed its form, scribes for the purpose were wanting, because the money to pay them had not yet come into existence. As yet judges were unable to receive evidence in any other than the most apt shape. But as the money came, things were set to rights by written compounds of falsehood and nonsense, which, under the name of pleadings, the parties were forced to utter, and to pay for, before the judges would suffer the matter to come before juries.

In the sort of judicatories in which the bench was not encumbered with any such appendage as a jury box, judges found themselves in this respect at their ease.

If in the presence of each other, and at the same time in the presence of the judge or judges by whom the fate of the suit was to be decided, the parties were heard in the first instance, the suit would in a great majority of cases be finished on that same sitting: and in the other cases, the speediest termination which the nature of the case admitted of would be brought to view by the exposition of the several facts. But in such a state of things, the pretence for official and professional extortion would have no place. In a case where property was the subject-matter of dispute, it became therefore a fundamental maxim, that in the presence of the judge or judges, on whose decision the ultimate fate of the suit depended, on no occasion were the parties to be suffered to meet in the presence of the judge: the parties being, unless by accident, the individuals by whom the facts in the case were in the largest proportion known, and in many cases the only individuals by whom any of those facts were known.

Upon the whole, then, two things appear sufficiently plain. One is, that the receiving evidence in its best shape is a practice that has obtained in all cases in which a jury has been called in: the other is, that the receiving evidence in this shape is an operation altogether as easily performed where a jury is not employed as where it is.

As to the quasi-jury system, the framer of it has nothing to get by any such mixture of absurdity and falsehood: accordingly, under the quasi-jury system, the evidence is received in the shape most conducive to the ends of justice.

One great and peculiar value of this plan will be seen to be its flexibility—its self-flexibility: with equal facility it will be seen applying itself to the most erudite and to the least erudite state of society: it might be employed not only in a democracy, but the most absolute despotism need not fear it.

Whatever be the effect of its influence, nothing can be more gentle and quiet, nothing else so gentle as its mode of action.

In the quasi-jury box may be seen a school in which the scholars are serving an apprenticeship in the art of judicature.

And these scholars,—in what number are they? Sooner or later they are the great majority of the whole number of those of whom the male population of the country is composed.

In England, under the existing system, every judge has an interest opposite to that of the people; and under the here proposed system, no judge has any other interest than that which coincides with that of the people. By no interest can he be led to wish to inflict punishment on any man, whom it could not be alike the interest and the wish of a jury to see punished.

Under this system, with what prospect of success could a judge pronounce a sentence or a conviction, which in his own eyes were unjust? Altogether unavailing would any such act be, except on the supposition of its passing without opposition through the censorship of the quasi-jury—and, moreover, finding a congeniality of guilt in the appellate judicatory. For the act being, in the eyes even of the agent, itself flagrantly unjust, is it possible that it should wear a more favourable aspect in the eyes of not only observers altogether impartial, but of jurors leagued by a community of interest, self-regarding and sympathetic, with the supposed objects of the intended injury?

To these safeguards is moreover proposed to be added that of an established delay, for the express purpose of giving time to all parties in any way interested, to make application to the appellate judicatory. Suppose, then, a sentence or conviction decidedly unjust, signed by the judge-immediate, what is the consequence? Before execution can be given to it, the whole country rings with denunciations of the injustice.

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§ 6. *Difference between Jury and Quasi-Jury.*

In the framing of the proposed quasi-jury, the object has been, as already stated, to retain all the apt features of the jury institution, to discard the unapt ones, and to add such new features as seemed apt with reference to the ends of justice.

By *apt*, understand with reference to the here proposed institution; for one feature will be brought to view, to which the beneficial effects of the jury system will, it is believed, be in great measure referable; but from which, if adopted into the here proposed institution, no effects but evil ones could be produced.

Between the jury system and the proposed quasi-jury system, the principal difference lies in this: By a jury, powers are possessed and exercised, such as to a great extent are *decisive* of the ultimate fate of the suit: powers of acquittal, for example, in all criminal cases. To a quasi-jury, no such decisive power is allotted.

With the exception of an application which is not of the essence of the system, a quasi-jury has no decisive power, and in that case it is not ultimately decisive. Of this power the exercise consists in giving or withholding allowance to appeal from the immediate to the appellate judicatory, in cases where, if, without this restriction, the right of appeal were left to the defendant, a very prominent load of certain vexation and expense would be imposed on prosecutors, witnesses, and jurymen, — in cases where the instances of its being subservient to rectitude of decision would be rare in the extreme. These cases are criminal ones, in none of which appeal, on application by a jury or otherwise, is allowed by English law.

The reason of withholding from a quasi-jury the power possessed by a jury is this: — Under the proposed judicial system, the prevalence of sinister interest on the minds of the judges is opposed by checks much more efficient, it is believed, than any which have been or can be opposed to it in the breasts of jurymen; namely, in the first place, sinister interest — the great cause of moral inaptitude in the case of judges: in the next place, relative and comparative deficiency in respect of intellectual aptitude — a branch of appropriate aptitude in which it is not in the nature of the case that these ephemeral functionaries should in general be able to compete with judges.

With the above exception, the character possessed by the quasi-jury partakes more of that of a section of the public opinion tribunal, than of that of a body of commissioned and official judicial functionaries.

That decisive and virtually negative power which is apt in a jury, but which would be unapt in a quasi-jury, being thus excepted, the features to which the jury institution is indebted for its aptitude, and which are here adopted and given to a quasi-jury, will be found accidentally only, not essentially, belonging to it.

These are — 1. The end to which the institution of this fraction of a jury is manifestly and confessedly directed; namely, serving as a bridle to the power of the creature of the monarch — the judge.

2. The publicity of the proceedings wherever this committee of the people at large makes its appearance.

3. The task which their power imposes upon the judge — the task of giving a public and immediate explanation of the case, with the reasons on which his expectation of seeing any course he would wish them to pursue pursued accordingly, rests.

4. The shape in which the evidence presented to this compound judicatory is always presented.

Of all these four features, no one can be assigned, which in the nature of the case might not have place in a judicatory constituted in any other manner, as well as in a judicatory of which a jury forms a part. For publicity might have place in a single-seated and uncompounded judicatory, as well as in that of a compound one; so likewise might the evidence be given in the best shape: the task of giving explanation and reasons to the auditory might be assigned to the judge, so there were but an auditory, no matter how composed; but unless along with the task, adequate motives were given for the performance of it, the task might as well not be given: these motives are not wanting in the case of a jury, nor will they be found wanting in the case of a quasi-jury.

Accidental as they are in their nature, with reference to the use made of this fraction of a judicatory in English-bred procedure, yet, but for the establishment of this institution, these vitally essential features would naturally have been as unknown in the English, as they are in the judicial systems of most other countries. But the point is scarcely relevant. The proper question here is — not what has been, nor what might have been, but what ought to be.

§ 7. *Collateral advantages or beneficial applicabilities, two.*

I. Its operation in the character of a school of justice.

II. The universality of its applicability — its fitness for being inserted into the judicial system under any form of government.

I. As to its operation in the character of a school of justice.

Compared with the jury system, this character is not peculiar to the quasi-jury system:

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only in a degree, but not on the whole, is this character peculiar to it. In this respect its advantages over the jury system are these:—

1. The superior magnitude of the population drawn into this school. Under the here proposed system, the subdistricts constituting the judicial districts of the immediate judicatory are more numerous than those from which, under the English system, juries are drawn.

For the avoidance of vexation and expense, the number of members proposed to be given to a quasi-jury is indeed considerably inferior to that which has place under the jury system; but the defalcation from this source is supposed not to be equal to the addition made from that other source.

2. The greater probability of a superior degree of attention being given to the subject-matter of the exercise in the quasi-jury school, compared with the jury school. In the jury school, what is done is principally done by the scholars together in a body; and though in their individual capacity there is nothing to hinder them, neither is there anything to invite them to interpose; in general, the foreman, or some other member (naturally the foreman,) takes the lead; and the giving an unreflecting assent is all that is done by the rest.

3. The indiscriminating miscellaneousness of the composition in the case of the proposed quasi-jury, compared with the sinister selection, which in all places, and at all times, is capable of being made in the case of the jury.

4. The condition of comparative freedom, and unembarrassed capacity of attention, in which, in the case of a quasi-jury, the minds of the members would be placed, in comparison of the inward sense of responsibility and concomitant embarrassment, which to a considerable extent may be apt to have place in the case of a jury, where the fate of the suit and the conditions of the parties to it is dependent on the verdict in which they join; particularly in the case where the eventual punishment rises to a certain pitch of severity, and more especially where death enters into the composition of it.

5. In the jury school, the head-master is a functionary whose lessons are by the nature of his situation kept in a state of perpetual opposition to the universal interest; in the quasi-school, he is a functionary whose lessons are by the ties that have been brought to view kept in a state of continued conformity to that same only right and proper standard of rectitude.

II. Now as to the universality of its applicability.

A popular government is the sort of government for the use of which it has been framed: of its applicability, its usefulness, and capacity of being employed in such a government, such proofs as have presented themselves have just been seen. But governments there may be, into which, though altogether despotical, the quasi-jury not only would be useful if admitted, but might even stand, as it should seem, no mean chance of being admitted; while by the absolute power which, in cases of the highest importance, the jury has over the result of the suit, all chance of its admission may stand eventually excluded.

Two ways there are, by which, disjunctively or conjunctively, the reconciliation between the systems of evil and this instrument of good might be effected.

1. The one is — the exclusion of this bridle on the powers of the judge from those suits on the occasion of which the opposition between the interests of the subject many and that of the ruling few is brought into exercise.

2. The other is — the composition of it in such manner as to prevent it from thwarting the views of the compounders.

On the other hand, what cannot be concealed is — that in a government the object of which is to keep or reduce the intellectual part of the mind of its subjects to the condition similar to that of the higher order of quadrupeds, and at the same time the sensitive part to a worse condition, no such institution as that proposed could stand any chance of being admitted: the design of it would be too palpably adverse to the design of the government.

The government of British India may serve for an example.

1. With the exception of the many-seated judicatories framed upon the Westminster-Hall model, single-seated judicatories are secured by necessity, a stronger power than choice.

2. On behalf of the natives, it has no aversion to security for persons, to security for property, nor even to increase of property, so as the value of East-India stock, but more particularly so as East-India patronage be not diminished.

3. Understanding that the increase of national wealth depends in no small degree upon the security of property as against unlicensed malefactors, it has no objection to the most perfect degree of security for property against all depredation from which it derives no profit: so as the maximum of all depredation, out of which it sees a capacity of extracting profit for itself, be secured to it.

4. The power of authorizing appeal not being, according to the here proposed plan, extended beyond those offences, which while they are most frequent, inspire most terror to individuals, would not give umbrage to government: nor, how beneficial soever, is it an essential feature.

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A form of government not essentially different from that of the Anglo-American United States, but regarded as in a still higher degree conducive to the only proper ends of government, is that for the use of which the institution in question was devised. But if well adapted to the proposed form of government, not less so would it be to that of the so happily established one. Under that government, the jury, with its absolute power, has not the least tendency to become destructive: but an effect which to a considerable extent it cannot but have is, — the weakening it, — the weakening it, namely, by the chances of escape which, in the case of guiltiness, it affords in the instance of the classes of crimes which, while they are so pregnant with evil to the person and property of individuals, are in so high a degree more frequent than all other crimes.

For the absolute power of a jury it has no use. In that seat of popular government there are no attacks upon the liberty of the press, or liberty of public discussion; — no secret confederacies for producing changes in government;—no conspiracies against government, organized by government itself for a pretence for making oppression still more oppressive. In that seat of frugality and equality, there is no propensity among jurymen to favour those practices by which the revenue of government is diminished. A United States jury has no government extortion or oppression to avenge: proportioned to the defalcation from the public revenue by the success and increase of smuggling, would be the injury to themselves: the produce of the taxes is employed, the whole of it, in the service of all: no part of it is put into the pockets of the imposers.

With reference, therefore, to any government having for its end in view the greatest happiness of the greatest number, its aptitude consists in its want of aptitude with reference to any government that has for its ultimate end in view the maximization of the happiness of those who share in it, and for its mediate, or at any rate its collateral end, the minimization of the happiness of all who are subject to it.

§ 8. *Jurisdiction.*

Question 1. Why to the power of a quasi-jury give the same all-comprehensive extent over the field of law, as to that of the judge, in respect to the species of causes?

Answer. — Reasons: 1. Because, if on any part of the field of law a sufficient demand for that institution has place, so has it in every other. True it is, that in the penal department, especially those cases in which application is made of the highest punishment, the demand is much more urgent than in the non-penal department, generally considered. But as to the non-penal department, if in any part of it the institution be preponderately useful, it rests with those by whom its title to all-comprehensiveness is disputed, to say at what point its utility ceases: and this will, it is believed, be found impossible.

2. Whoever it be to whom the institution of a jury, on the footing on which it stands at present in England, is an object of approbation, — if the question were put to him, what consideration that approbation has for its grounds, his answer would probably be, the operating as it does in the character of a check and bridle to the power of the judge. But for this security against misdecision, if any sufficient demand has place in any part of the non-penal department of the field of law, impracticable will be the endeavour to find any other part in which an equal demand has not place.

The incompetency of a jury under the English system in all causes of complexity has been already shown: that incompetency being greatly enhanced by those features of deficiency, the exclusion of the parties from the theatre of justice, and the inability of a party on either side, either to furnish his own relation in support of his own demand, or to call upon the other party for his.

These deficiencies had their origin in the artifices of the judges and other lawyers. In the Saxon time, and for a long time afterwards, the cast of the system was altogether popular. The locatee of the king presided, but the judges were all who were not in a state of slavery. In a judicial assembly in which, when all non-parties were present, so of course would be all parties, in so far as it was in their power. Each would be eager to tell his own story — each would be no less eager to extract matter of the like tendency from his adversary. In this way, the same meeting that gave commencement to a suit would commonly give termination to it. So it is at this day in those judicatories which are permitted to have existence for the recovery of small debts, and in those days scarcely were any suits known that would not now-a-days be regarded as small-debt causes. Such a state of things was too favourable to justice to be endured by lawyers.

In those days the judicial districts were small, and in the same proportion numerous. After the Norman conquest, judicatories were established by the king, each of them having, for certain purposes, jurisdiction over the whole kingdom. The whole kingdom was in this way converted into one vast judicial district — the communication at the same time difficult to a degree at present not easily imagined: and by the barbarity of the times, insecurity was added to difficulty. Under these circumstances, few but would find their con-

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venience in being permitted to attend and plead by deputy. Under the name of attorneys and serjeants, a set of professional lawyers was thus formed, who became partners in the sinister interest of the judges by whom the system of procedure was framed; and it was out of the order of serjeants that men were taken to fill the judicial benches.

In this state of things, the carrying to the highest pitch the aggregate mass of delay, vexation, and expense, became of course the ruling object of the partnership in all its branches: expense for the sake of the profit extracted out of it; delay and vexation for the sake of the addition which those evils made to the expense.

A law-book, written in the time of Henry the Second, is to this point very satisfactorily instructive. It had for its author no less a man than the Chief Justiciary Glanville, the head man of the law. In profession it covers the whole field of judicature. It is occupied almost exclusively with forms of excuses for non-appearance. These excuses were already reduced to a system. Of the different species of causes as determined by the nature of the service demanded, scarcely is anything to be found: as little of any stages through which the business of judicature had to pass. An obvious inference — and it seems an incontrovertible one — is, that when once the parties were brought together in face of each other and of the judge, the matter was as good as settled: it was settled as in our day a tradesman's demand of payment for a few shillings' worth of goods is here and there in a small corner of the country allowed to be settled.

For both these deficiencies Rome-bred law presented a ready-made supply. To jurymen called from all parts of the kingdom — in some cases to the metropolis, in others to the ever-varying residence of the monarch—called from all parts, and consequently in a large proportion from parts at the remotest distance from their respective homes,—the attendance of a few days sufficed to constitute an enormous burthen. Those by whom Rome-bred law was imported from Rome to England, required not in their judicatories any such incumbrance as a jury-box: provided with a quantity of ready-made power, they knew well how to fill up any vacuity that could be imagined. Sitting without intermission, with hands open for fees, and ready to close upon them at whatever time and season offered, no causes could be too complex for them. At one grasp they took possession of the whole mass of moveable property throughout the country, as it became vacant by the death of the respective owners. Object they had no other than the application of it to pious uses: but of all imaginable uses, none could be more pious than their own.

The policy of the learned fraternity, as above, had kept the suitors out of the only place in which they could either deliver or extract from others *vivâ voce* evidence. Glad of course would they have been to have extracted it in the written shape: for when words are once designated by visible and permanent signs, they became capable of being taxed. But in this form, for several centuries they were not able to extract them: the original structure of this judicial system had not furnished machinery adapted to this purpose: small was as yet the number to whom it could be applied. Meantime their learned rivals and competitors were on the watch: no sooner was the supply of writing found sufficient, than they stept in, and applied it to their use.

To all who had anything to ask of them, those judicatories were open. They received petitions; furnished persons (who after telling their story upon paper were ready to give expression to them) with such questions as a person might wish to receive answers to, from those at whose hands he demanded them; and applied the whole force of their authority in exacting those answers, without which the questions would have been of no use.

Question 2. Why, in each suit, seek to render the authority of the quasi-jury co-extensive with that of the judge?

Answer.—Reasons: 1. For a reason similar to that mentioned in answer to Question 1. If in any one stage requisite, so in every other. In each stage the demand is the same as in every other: in each stage the temptations to which the probity of the judge stands exposed are the same.

2. To the unobligativeness of the authority here given to the jury, are the interests of justice indebted for the practicability of giving this extension to the application made of this check.

From the absolute power of frustrating the exercise of the power of the judge, and this in every one of the numerous stages which a cause, in a certain degree complex, must of necessity go through, a mass of confusion, and thence of injustice, beyond all power of calculation, might be the results. But forasmuch as, with the exception of the power of allowing or disallowing appeal in certain criminal cases, no obligatory power is here given to this section of the public-opinion tribunal—in a word no functions other than the auditive, interrogative, and censorial functions — hence it is, that from the magnitude of the extent given to its authority over the whole course of the suit in the way to its conclusion, no such nor any other evil can arise.

In the English system, whatever be the number of sittings in the course of which, on some occasion or other, a suit comes upon the carpet, — some of those sittings being in public, others in the closet of the judge, or of

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this or that one of his subordinates, — only in one of those sittings is a jury introduced.

Question 3. Why is not the authority of the quasi-jury here extended to summary sittings, nor thence to any summary suits?

Answer. — Reason: 1. Apprehension of the extent of the demand for individuals to act as quasi-jurymen, were such extension given, and thence of the mass of attendant vexation and expense.

In the case of *appointed* suits heard at the appointed sittings, measures can all along be taken, namely in the preparatory summary sittings and hearings, of the quantity of quasi-jury time necessary to be applied: and of the appointed days, the place in the calendar may be fixed, and in so far as the judge-principals have power insufficient, judge-deputies provided accordingly. Not so in the case of the summary suits.

The power of the judge is not by this omission left without check. In the first place remains the check imposed by the body of visitors, for the maximization of which arrangements have been made elsewhere.

In the next place comes the power of appeal here provided. This appeal is not from the judicatory of a subordinate to a superordinate judicatory, but from one judge to another, or even the same judge at another time: at which other time the quasi-jury will form a part of the judicatory, and thus the delay and expense attached to local distances will not be incurred. Whether, on the second and more deliberate hearing, the judge shall be the same or a different one, must, it should seem, of necessity be left to the discretion of the judge. If at the summary sitting the judge was a judge-depute permanent, the natural course would be, that at the appointed sitting it should be the judge-principal: the opposite course would be a sort of anti-climax. But it is only by necessity that the judge-principal stands excused from serving on the summary as well as on the appointed sittings: and so far as he does thus serve, the appeal thus made must be either to his virtually subordinate substitute, or to himself.

In the appeal *ab eodem ad eundem*, there is not in this case either absurdity, danger to justice, or even innovation. In English equity procedure, what is called a rehearing is no uncommon incident. True it is, that in one case of a rehearing, the appeal is in effect and fact from the first judge to a different one. This case is that where (a change in the situation of chancellor having taken place) the appeal is from the former chancellor to his successor. But another case of a rehearing is, where, at the instance of a party, the same chancellor hears a second time arguments on the same subject-matter as on the first.

In this case there is no fraud; all is what it seems to be. The fraud is, where the appeal is from the chancellor himself, to a judicatory of which he is not only a member, but the only thinking one — a judicatory in which, on ordinary occasions, none attend except two cyphers, who vote as they see him vote, without the pretence of thinking: on other occasions, none attend but the few sent thither by some latent interest, which, if made apparent, would show them to be each of them judge in his own cause.

"But," says somebody, "you, in whose eyes these same individuals are not unapt to bear a prominent part in the business of legislation, on even an unbounded scale, — can you, with any consistency, regard them as unapt with regard to a function so limited in its extent, so subordinate in its importance, as that of pronouncing a *yes* or *no* in a case where nothing more is at stake than the fate of this or that individual?"

Answer: 1. In regard to the power I give to them, — it is under the pressure of necessity that I give it to them, because in no other hands could it be reposed without the absolute certainty of its being abused.

2. In the case of the power given to them as to the choice of legislators (in no instance whatever is any power of legislation given to them,) I leave them — as according to all experience I may without danger leave them — to be assisted, and, in as far as they please, guided by general reputation: no opinion, no judgment of their own, are they in that case called upon to pronounce. But in this case, no judgment can any one of them pronounce which is not his own: no less direct and complete is the cognizance taken of the matter in their situation, than in his situation is that of the judge. In the forming of it, no assistance have they that so much as professes to be impartial, other than that of the judge — of that very functionary, to whose power the one and sole use of them is to apply a check — and under whose guidance, in so far as, without forming, in relation to the matter in question, an opinion of their own, they commit themselves, their function is inefficient and useless.

§ 9. *Interrogative function.*

Persons to whom, with a view to the ends of judicature, any member of the quasi-jury is authorized to address questions, are in general all other actors on the judicial theatre.

In particular, they are as follows: —

1. Any party to the suit on either side; to wit, whether in his quality of party interested, or in his quality of party testifying — or in other words, litigant witness.

2. Any extraneous witness.

3. Any assistant, non-professional or professional, of any party on either side.

4. The pursuer-general, or any depute of his, if present, whether by office engaged in the particular suit in question or not.

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5. The defender-general, or any depute of his, whether by office engaged in the particular suit in question or not.

6. The registrar or his deputy.

7. Any fellow-member of the same quasi-jury.

8. The officiating judge, whether principal or depute.

Correspondent to the interrogative function on the one part, is the responsive function or service on the other: of an exercise of the interrogative function on the one part, the object is, to produce an exercise of the responsive function on the other.

To render obligatory the exercise of the correspondent responsive function, the following are the qualities which must have place on the part of the discourse uttered in the exercise of the interrogative function:—

1. It must be relevant; it must bear some assignable relation to the matter in question.

2. It must be apt; it must be such that an answer given to it may be eventually in some way or other conducive to the ends of judicature; it must not be frivolous.

If being neither irrelevant nor otherwise unapt, the interrogation addressed is followed by relevant and apt responsion, it is well. If being addressed to a person other than the officiating judge, and being in his eyes relevant and apt, such responsion as in his judgment is relevant and apt fails of being given to it, — the judge will apply his power to the exaction of such answer, according to the situation of the non-complying individual.

If it be a party, he will give him to understand, that of non-compliance the effect may be the loss of the suit: that is to say, if it be on the pursuer's side, the non-performance in the whole or any part, of the service demanded by the suit; if on the defender's side, the rendering of such service in the whole or in part, in so far as the rendering it will be at the expense of the non-complier: and such, accordingly, in the case of necessity, is the arrangement that may be made.

If it be an assistant, professional or unprofessional, of a party, and in the declared opinion of the judge such non-compliance has for its cause (especially if it be in concert with the party) the endeavour to save a party, he being in the wrong, from loss of suit as above, intimation may be made to him, that in relation to the interest of the party in the suit, such non-compliance will have the same effect as if it had been by the party himself that it had been manifested: and such, accordingly, in case of necessity, is the arrangement that may be made.

If it be a pursuer-general, or defender-general, or the registrar, or their deputes respectively, the judge will cause make a minute *in terminis*, of such discourse as by the several persons who took part in it was employed; which minute will constitute an article in the incidental complaint book.

So if it be a fellow-member of the quasi-jury.

So if it be the officiating judge.

§ 10. *Opinative function.*

The judge's recapitulatory statement, opinative decree, and imperative decree, having been delivered, — thereupon comes the quasi-jury's function — the opinative function, having for its subject-matter the two above-mentioned decrees of the judge. Of this function the exercise is, in the nature of the case, susceptible of any one of the following shapes, and in any one of these shapes they are equally free to exercise it: —

1. Express refusal to pronounce any opinion.

2. Consent to the whole, tacitly given.

3. Consent to the whole, expressly given.

4. Dissent to the whole, expressly given, but without proposal of substitute or amendment.

5. Dissent to a part, expressly given, but without proposal of amendment.

6. Dissent to the whole, with proposal of substitute.

7. Dissent to a part, with proposal of amendment.

The opinion of the quasi-jury being in one or other of these shapes made known, entry is accordingly made on the record by the registrar, stating the shape in which it was so made known: silence, after presentation of all these several shapes to their option, and a sufficient pause for the expression of it, — silence being taken for tacit and universal consent.

If to the whole, or to a part, any substitute or amendment is proposed, the judge either assents to it, and changes or amends his decree or decrees accordingly, or declines doing so: in either case, entry accordingly is made on the record.

In the three first-mentioned cases, — namely, express refusal to pronounce opinion, consent tacit, and consent express, — execution in virtue of and conformity to the judge's imperative decree, unless appeal be made, follows of course.

In the four last-mentioned cases, unless appeal be made, it rests with the judge to cause execution to have place: if appeal be made, it takes its course in these four cases, as it would have done in any of the three first.

As to the appeal, in what cases it shall, and in what cases it shall not have the effect of obliging the judge-immediate to stay execution, will be found determined, regard being had to the several particular cases in the penal and non-penal codes.

If from non-compliance with any substi-

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tution or amendment proposed by a quasi-jury, irreparable damage will ensue, while from compliance equiponderant damage will not ensue,—the judge will in this case regard himself as bound to make exercise of his suspensive, or say execution-staying function, to that effect.

Only in the case of its being the act of the quasi-jury in its collective capacity, can entry be made of dissent in any one of its four shapes as above; but the act of the majority of the jury is the act of the jury — of the jury in its collective capacity.

To a minority of the jury on this occasion, as to all persons on all other occasions, the press is open for the reception of the free expression of their sentiments.

On being thereto requested by the quasi-jury, the pursuer-general present is expected to lend his assistance to the purpose of giving apt form to any such proposed substituted decree or amendment, as above.

So, the defender-general.

Under the dominion of unwritten law, called also jurisprudential law, the question of law to be determined is — what, on the individual occasion in question, are those terms of the law which (in default of all relevant law made by the legislature) may with most propriety, as if it had been made by the legislator, be made by the judge — as being most analogous to the tenor of the rule of action which has place in the political community in question — statute law and jurisprudential law taken together.

The question of fact is either an absolute question or a comparative question. A comparative question is a question concerning degree; an absolute question of fact is every question in which the consideration of degree has no part. Degrees are either degrees of quantity or degrees of quality. Degrees of quantity are no otherwise determinably expressive in any absolute form than by numbers. Every absolute question of fact may, without regard to quantity, be so worded as to be susceptible of a true answer, either by a *yes* or a *no*. A question concerning quantity admits of as many answers as there are degrees in the scale in question, numbers, or series of numbers, contained in it, of which it is assumed that on the occasion in question some one or other is the proper.

A question, the answer to which is either *guilty* or *not guilty*, is a question concerning law and fact combined. In the answer expressed by the word *guilty*, two assertions are contained; namely — 1. The individual in question, at the time and place in question, or at any rate at some time and place, did perform a certain act, positive or negative. 2. The act performed is of the number of those which stand interdicted by some portion of law, namely, legislatorially existing law, or by the judge in question may and ought to be considered as interdicted by a portion of imaginary law, to be made by him for the purpose.

Examples of scale of quantities: — 1. Money: as where a fixation is to be made of the sum to be transferred from a defendant to a pursuer, in compensation for loss or injury; or from defendant to the public, in the name of punishment.

2. Time: as when, in case of chronical punishment, a fixation is to be made of the length of time during which it shall continue: say banishment, confinement, imprisonment.

§ 11. *Warrant for Appeal.*

If to a set of men thus composed, any determinately efficient power be fit to be given, a case in which it may be of use to give it is, the giving admission to the faculty of appeal, divested of the inconveniences naturally attached to it, in those criminal cases in which, if left at the option of the defendant, it would be sure to be made by all who were guilty, and in so far produce much vexation to the injured, without benefit to the criminal. Among these are such as are at the same time of the most mischievous kind and the most frequent occurrence: in particular, offences of the predatory kind, when committed by habitual, and as it were professed depredators, especially if accompanied with homicide, housebreaking, or personal violence or menace.

In a case of this sort, appeal, if allowed, will come in a manner of course: it will come for the sake of the delay applied to the punishment, and the chance which all delay affords, or appears to afford, of ultimate escape.

But by every appeal, suffering is by the innocent and injured almost constantly experienced. Under the worst system in existence, the instances in which a person really innocent is condemned, and in consequence of condemnation actually made to suffer punishment, are probably, comparatively speaking, very rare: rare even under the system of secret procedure acted upon in despotic states; still more rare under the system of publicity which has place in England, and elsewhere under English-bred law. Under the here proposed system, with such checks as are here applied to the purpose of securing moral aptitude on the part of the judge, they may, it is hoped, be reasonably expected to be still more so.

At the same time, a state of things, in which it lies in the absolute power of a single person in the situation of judge (even with his moral aptitude thus checked and guarded) to subject a human being, perhaps innocent, to the extremity of allowed punishment, is a state of things which to a human mind cannot but present considerable alarm.

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But the state of things in which claims of this sort are not only so probable, but so extensively felt, is a state of things which, under a system of which the present proposed code forms a part, would scarcely in any instance have place. This state of things is one in which punishment, in its nature absolutely irreparable, is lavished, either with the most savage and deliberate cruelty, or with the most thoughtless extravagance. There is but one mode of punishment, the mischief of which is absolute and totally irreparable — and that is mortal punishment.

For argument's sake, instead of mortal punishment, suppose even mutilation employed, — mutilation even in parts or organs more than one. Not altogether unsusceptible of reparation would even this punishment be: for, for suffering in this shape, reparation, and to a very wide extent, is almost everywhere actually in use: witness this, in the pensions granted in the sea or military service; and it is a matter generally understood, that by the individuals by whom on this account reparation in this shape and degree is received, it is not unusually regarded as adequate; insomuch that if asked, whether for the same reparation they would originally have been content, or would now, if it were to do over again, be content to be subjected to the same suffering, the answer would be in the affirmative.

The temperament here proposed is accordingly, that in such instances, in regard to those criminal cases of the higher order which are of the highest degree of frequency, appeal should not in general be admitted: but that, on a certificate given, either by an entire quasi-jury, or by a portion of it, or say perhaps, in some cases, even by a single quasi-juryman, that in his opinion innocence is certain, or culpability doubtful, appeal should be allowed to be made.

Of an arrangement of this sort, one effect, it cannot be denied, would be the putting it in the power of a criminal, by means of a bribe given to a quasi-juryman, or to the number of quasi-jurymen in question, to obtain a certain quantity of delay in the execution of the sentence.

Of appeal in highly criminal cases, in general, what shall be the effect? The appellate judicatory—shall it pronounce its decree upon the bare view of the evidence, as reported from the immediate judicatory? — shall it, of course, try the cause over again, by hearing evidence as if none had before been given? — or shall it have the option between the reported evidence and the giving a fresh hearing to the evidence? On the choice between these three courses, it is manifest how much would depend, and how considerable between them respectively might be the difference in point of effect.

So likewise as to the nature of the offence, — whether it has or has not anything in it of a constitutional character.

§ 12. *Costs of quasi-trial.*

Of the quasi-jury, the expense taken in all its parts is very considerable: it is composed of the evils correspondent and opposite to the collateral ends of judicature, namely, delay, vexation, and useless expense.

This considered, two consequences follow: —

1. One is, that when, in the judgment of those who have any interest in the suit, this check with its expense is needless, the expense ought not to be incurred.

2. Another is, that in so far as the evil consisting of the expense is preponderant over the good consisting in the security, neither in this case ought it to be employed.

Hence a proposition which may naturally enough appear incontrovertible at first sight is, that if no one of the parties conceive himself to have any ground of complaint against the conduct of the experienced judge, there can be no use whatever in clogging the operation by a multitude more or less considerable of unexperienced ones.

If to the justice of these observations there be anything to oppose, it must be on this ground, or some such ground as this, — namely, that by reason of the relative ignorance and inexperience of a party, it may happen, that though the conduct of the judge has been unapt, and that to such a degree as to have been productive of misdecision to the injury of the party in question, yet by reason of his own relative inaptitude, it may be out of his power to determine, whether in that same conduct there has been or has not been anything unapt; or else, that by timidity —by fear of incurring the resentment either of the judge in question, or of the class of men to which the judge belongs, he may be effectually prevented from availing himself of any such security as that in question, supposing it here to have given him the faculty of employing it; or, lastly, that by indigence, it may happen to him to be incapable of making use of it.

To the order for quasi-trial, the judge adds, in relation to the expected costs thereof, such order as the nature of the case—consideration had of the pecuniary circumstances of the several parties — appears to him to require. The options are as follows: —

1. He leaves the burthen of costs in its natural seat; leaving it to each party to bear his own part of it.

2. In case of need, he requires a party or parties on one side, to make advance of money on this account, in any proportion, in favour of a party or parties on the other.

His care will be, not to suffer the additional delay, vexation, and expense, to be employed

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by the party who can best endure it, as an instrument for the oppression of one who can least endure it.

§ 13. *Features in jury-trial here discarded.*

First come the features of jury procedure; and under the head of each of them the opposite state of things here will be briefly undernoted.

These may be distinguished into such as are regarded as being productive of evils opposite to rectitude of decision, the main end of justice — and such as are regarded as productive of evils opposite to the collateral ends of justice, namely, needless delay, vexation, and expense.

1. In a jury, number of persons twelve. In a quasi-jury, not more than three.

2. Of a jury, on failure of instantaneous agreement, forced transference to a closed room: no other persons present at their deliberation. Of a quasi-jury, no such transference, unless they desire it, or one of them desires it.

3. In the case of a jury, immediately before the commencement of the hearing, — a solemn promise exacted of each, to declare an opinion on one side of the question, whatever it be, or on the other side. On the part of a quasi-jury, no such promise is exacted or received.

Note that, on every question in relation to an opinion, and that which is in contradiction to it, the possible states of the mind are three; namely, decision on the affirmative side, decision on the negative side, and indecision: and of this last state, the exemplification will be the more frequent, the less the degree of instruction is on the part of those to whom the question is put. As for example, speaking of an individual in the character of defendant in a penal suit, questions no more than two: Is he guilty?—or, Is he not guilty? Answers which the nature of the case admits of, three; namely, Guilty, *i. e.* my opinion is, that he is guilty. — Not guilty, *i. e.* my opinion is, that he is not guilty; or, I have not been able to form an opinion whether he is guilty or not. Of the real state of the man's mind, one or other of these answers cannot fail to be the true expression. The true one will be this third state, as often as the same opinion fails of being entertained by all of them, unless a decided disagreement has place — one or more entertaining the positive opinion, the other or others the negative. But for this absence of all opinion, frequent as it cannot but be, the law has not provided any expression: the consequence is, that in the instance of every one of the jurors who has found himself unable to form a decided opinion on either of the two opposite sides, the promise which the law has forced him to make is violated.

To the conception of the founders of Roman law, this natural state of the mind had presented itself: a form of words, namely, *Non liquet*, had accordingly been provided by them for the expression of it. But obvious as is the conception, on the part of the founders of English law in this particular, the state of mind was too barbarous to admit of it. No distinction did they know of between decision and indecision. As little perceptible to them was the distinction between unconscious and self-conscious misdecision — between blameless error and intentional injustice. Supposing the decision erroneous, the conclusion was, that those who joined in it could not but be conscious of its being so. Accordingly, by the verdict of a second jury, to punish the first jury with one and the same punishment in every case, and that a punishment involving utter ruin, was a practice as common as that of simply sending the original suit to a second jury is at present.

4. A declaration of an opinion on the one or on the other of the opposite sides of every question (except in the case of a special verdict) — which declaration is consequently — on the part of every one whose opinion fails of being exactly the very opinion declared as and for the opinion of the whole — false: and the correspondent promise violated.

In cases styled *civil*, a verdict styled *special* is admitted. But in cases styled *criminal* (not to speak of those styled civil,) no such verdict can, without the concurrence of the judge, be admitted: and in this case, too, of a special verdict, the same declaration of unanimity as in the case of a general verdict is indispensable.

In speaking of the verdict of a jury, the language universally employed is, as often as any such difference of opinion has place, undeniably false: what is said is, that it is unanimous; that is to say, that they are all of one mind. To render the expression true, it would be necessary to substitute to the word unanimous, some such word as *univocal*, all of one voice — all joining in the voice of the foreman, where, as for example, in a case called criminal, the words he pronounces are, *guilty*, or *not guilty*.

In the case of a quasi-jury, no such univocality is exacted.

5. To the promise thus made — the promise made by every man, that his opinion shall be the same as that declared by the foreman, is attached a religious ceremony, by which it is converted into an oath. The ceremony consists in a man's saying, *So help me God*, and thereupon kissing a book, which for this purpose has been put into his hand.

The promise having been thus converted into what is called an *oath* (though with more propriety it might be called a *vow*,)

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every violation of it is thereby converted into an act of perjury.

In the case of a quasi-jury, no oath is administered; no perjury therefore can have place.

6. In case of disagreement, confinement inflicted on all, until a universal declaration of agreement has been produced on the part of every one of them: confinement accompanied with circumstances of unendurable and consequently never endured affliction, such as convert it into torture. Torture-master, the judge: the torture being continued till they all join in declaring an opinion dictated by him, or in his default, any one of the jury — until they all join in that one of the two decisions which is dictated by him.

If the verdict they come out with is not agreeable to the judge, he sends them back again till they are agreed; and this he does as often as he pleases. Of late, the functions of torture-master in this way have not frequently been performed by the judges: but there is nothing to hinder it, and it may be administered for any length of time.

Whether this function be or be not administered by the judges, it may on any occasion be administered by any one of the jurymen to all the rest.

The ceremony is to make every one of them keep his promise: the torture is to make some of them break it. The torture has always been more powerful than the ceremony. So plainly irresistible is the possible amount of it, that the actual scarcely ever amounts to anything more than a comparatively slight temporary uneasiness.

Thus it is, that for making eleven good men and true (for such is their appellation) perjure themselves, the equivalent of the prick of a pin suffices.

In the case of the quasi-jury, production of perjury being no part of the danger, neither in that shape nor in any other — neither by the judge nor by a quasi-juror, is any such function as that of a torture-master's allowed to be exercised.

7. Concealment of what passes — concealment from all but the patients, while the torture is at work. The time is supposed to be passed in deliberation: but for this supposition, however, the nature of the case furnishes not any apparently strong ground. If the contest were a contest between understanding and understanding, yes: but the understanding has nothing to do in the business; the contest is between will and will; the question is, who is likely to endure the inconvenience? for whoever it be by whom it is longest endured, by that one are the terms of the verdict determined: the victory is to him by whom the part of an obstinate man is acted with the most success. To the arguments urged by professional advocates on the part which he espouses, it is not likely that under such circumstances any material and efficient addition should be made by him whose determination is to conquer or die.

In the case of the quasi-jury, of course no such concealment can have place.

8. Responsibility to the power of the legal sanction excluded altogether: punibility, none.

A quasi-juror is, in case of self-conscious delinquency, punishable.

9. Responsibility to the public-opinion tribunal, if not excluded altogether, minimized: nothing but the bare verdict, guilty or not guilty, being exposed to the public eye. The grounds of it being thus covered by impenetrable darkness, what blame can under such circumstances be passed is, in the instance of each one, reduced to next to nothing, by the multitude of those amongst whom it is shared.

Could but the light of publicity, by some such power as that of the Devil upon two Sticks, be regularly thrown upon the business of this well-closed theatre, the scenes that would be exhibited would be such as would be enough to dry up the stream of eloquence now so perpetually poured forth upon this matchless fruit of the wisdom of English ancestors. This, however, is physically impossible. Laid open indeed to the public might everything be that passed; but the scenes which in that case would be exhibited, would have little resemblance to those which have place among a set of men, in whose instance the sense of common distress and common weakness could scarcely fail to be productive of mutual indulgence and prudential silence. Out of a school thus circumstanced, tales of ridicule are in little danger of being told.

In the case of a quasi-jury, in the instance of any one of its three members, to whose mind an observation which he is desirous of communicating to his colleagues has presented itself, — if it be the pleasure of the others to hear him, they retire for that purpose. In the judicatory itself they cannot continue, because that would be incompatible with ulterior business. A retiring room is provided for them; and as to the giving admission to such other persons as the room will hold, the difference between the giving and withholding it, does not present itself as being of much importance.

CHAPTER XXVII.

RECAPITULATORY EXAMINATION, OR QUASI-TRIAL.

IN certain cases, superadded to the usual examination of the evidence, is another, styled a recapitulatory examination, in which cases the preceding examination is for distinction's

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sake styled the original examination. Synonymous to recapitulatory examination is *quasi-trial*, as being before a quasi-jury.

At the recapitulatory examination, whatsoever evidence was received in the course of the original examination at one or any greater number of sittings and hearings, is received a second time, and if possible altogether, at one and the same sitting; no adjournment being made, unless at that sitting the time capable of being employed at one sitting be exhausted.

At the recapitulatory examination, no evidence is received which was not received at the original examination.

At the recapitulatory examination, the question of law may, at the desire of a party on either side, be reconsidered.

The original examination was performed by a judge acting singly. No recapitulatory examination is performed except before a quasi-jury. The judge has them for assessors. To bring the suit under the cognizance of this section of the public-opinion tribunal, is one principal purpose of this second examination.

Exceptions excepted, by what judge soever, whether principal or depute, the original examination was performed, so may the recapitulatory.

The cases in which a recapitulatory examination has place, are the following: —

1. Where, for his own satisfaction or that of the public, the judge himself desires it: for his own satisfaction, to wit, that the several portions of evidence which had been received on the original examination may be re-exhibited, confronted, compared, and reconsidered.

2. Where, on either side, any party is desirous that it should have place.

In certain cases, consideration had of the necessary severity of the punishment, and the probable helplessness of the class of persons most liable to be exposed to it, the law, for the better security of the defendant, requires the check of a quasi-jury to be applied to the power of a judge.

When the original examination has been gone through, it will rest with the judge either to pronounce the definitive opinative decree, or to appoint a recapitulatory examination; adding, in this case, the day on which, and the judge by whom it shall be performed.

The opinative decree pronounced, together with the imperative decree grounded on it, — it will rest with parties on both sides either to acquiesce in it, or to make requisition for a recapitulatory examination: which examination will, at the requisition of any party, be accordingly performed, unless preponderant evil in any shape shall have been shown as resulting from it; for example, intolerable expense to any party, or in consequence of the delay, a loss of evidence. A requisition for this purpose differs from an appeal in the ordinary sense of the word, no otherwise than in this, namely, that it may be from the judge in question at one time, to the same judge at another time: and by this quasi-appeal, the expense, delay, and vexation, produced by the transference of parties and evidence, to another and commonly more distant judicatory, is here saved.

If appointment made of the recapitulatory examination be on the part of the judge spontaneous, it will be desirable, if the other business of the judicatory permit, that the judge by whom it comes to be performed should be the judge by whom the original examination was performed. By the recollection of the lights afforded by the original examination, especially in respect of consistency and inconsistency as between the testimony given by a witness on the one occasion, and the testimony given on the other occasion by that same individual, additional clearness, correctness, and completeness, may frequently be given by the conception formed on the later occasion by the judge.

When by the judge no recapitulatory examination is desired, he so declares, and thereupon pronounces his definitive decrees: putting it at the same time to each of the several parties, whether it be his desire to have such examination or not: if of any one of them the answer be forthwith in the affirmative, a day and hour are thereupon appointed: if by any one, time for consideration is requested, a day and hour are appointed for the answer; and in the event of its being in the affirmative, the appointment of day and hour for the quasi-trial remains.

Till such answer is given, the decrees are declared provisional: when the answer is given in the negative, they are declared peremptory.

If it be at the requisition of a party, it may be matter of doubt and discussion, whether on the latter occasion it be better that the judge be the same, or a different one. To set against the advantages of identity as above, there may in this case be the disadvantage resulting from mutual dissatisfaction as between party and judge; the danger lest, from the dissatisfaction testified by the requisition, displeasure, with correspondent partiality, be produced in the mind of the judge: to obviate uneasiness on this score, as far as may be, will of course be among the objects of his solicitude.

Antecedently to this examination, to obviate useless delay, vexation, and expense, the judge will call upon the parties on both sides to admit all such relevant facts, in respect of which no sincere doubt can have place anywhere: giving them to understand,

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that of all delay, vexation, and expense, produced by insisting on the re-exhibition, or exhibition of evidence of a matter of fact in relation to which no sincere doubt can have place, the burthen will be made to fall on the head of him or them by whom the evil in this same shape has been produced; and that for any such insincerity, over and above the burthen of making compensation, punishment, under the name of punishment, may, whenever the occasion calls for it, eventually be inflicted.

The recapitulatory examination may have either, or both, of two purposes — namely, 1. Deriving additional instruction out of the mass of evidence; 2. Exposing the conduct of the judge to scrutiny and comment at the hands of the committee of the public-opinion tribunal specially commissioned for that purpose. To the first end it may be contributary, even where there is but one piece of evidence, and that a mass of oral testimony delivered from the mouth of one individual; though the case in which the probability of its usefulness is likely to be greatest, is that in which, by the collision of mutually contradictory testimonies, new lights indicative of the truth are struck out or endeavoured to be struck out: but although, in the case in question, it should be clear that in this shape no good can be produced, there remains that other shape in which it may in any case be produced.

The judge does what in him lies, to the purpose of preventing the right of requiring a recapitulatory examination from being employed by insincerity as an instrument for the manufacture of useless delay, vexation, or expense.

In this view, if upon completion of the examination the requisition appears groundless, he imposes upon the parties concurring in the requisition the burthen of making compensation for the damage produced by it in all shapes: if, moreover, it appears to him, that in the mind of the requisitionist it had no other object than the production of useless delay and expense, to the injury of any other party or parties, he imposes, in addition to the burthen of compensation, a pecuniary punishment to the use of the public; or in case of insolvency, the succedaneous punishment provided by the penal and non-penal codes. But the quasi-jury may, if they think fit, reduce in any proportion the ulterior punishment.

A requisition is said to be accompanied with insincerity, where the nature of the case being such, that on the part of the individual in question, while any such belief as that, by a recapitulatory examination, the evidence can be placed in a light in any respect new, is morally impossible, he perseveres in making his requisition notwithstanding.

In certain cases, the course of the original examination will lead it to assume the character of an explorative, or say an evidence-discovery examination; — during which, the procedure will wear the character, and be designated by the name, of investigatorial procedure.

Investigatorial procedure (as will have been seen in the chapter on Evidence,) has place, in so far as one lot of evidence is employed for the discovery of another.

A lot of evidence, which of itself would not throw light in any shape upon the fact in question, and which accordingly would not be fit to enter into the composition of the grounds on which the opinative decree is founded, may be not the less well adapted to the purpose of bringing to the cognizance of the judge, apt and appropriate evidence: as where auditor says, "I did not see anything that passed; but by oculator I have been informed that he did." Here, then, from auditor, whose testimony with relation to the fact in question is not relevant, the judge is informed of the existence of another individual whose testimony, if the former said true, will, with relation to that same fact, be apt and appropriate evidence; the testimony delivered by auditor will, with relation to that same appropriate evidence, be indicative evidence.

It may happen, that not only the evidence of the same person, but the same article of evidence, shall operate on the same occasion in both characters — that of appropriate, and that of simply indicative evidence; as if auditor were to say, "I saw what happened, and so at the same time did oculator: he being at that same time near me, and looking the same way.

On the occasion of the recapitulatory examination, all evidence which has been merely indicative, and not appropriate, will of course be omitted; that is to say, the individual by whom it was exhibited will not on this occasion be examined; unless perchance such examination should prove necessary to the purpose of corroborating or infirming the testimony of him whose evidence had been stated as being relevant and appropriate evidence: as if oculator, though stated by auditor as having been present on the occasion in question, and upon the original examination admitted his having been so, should, upon the recapitulatory examination, deny his having been so; in this case it might be of use that auditor should be forthcoming for the purpose of being confronted with him, that so, with the help of mutual interrogation, the truth of the matter may be brought to light.

On a day in which there is no recapitulatory examination on the paper, the quasi-jury will add itself to the company of spontaneous visitors.

When in consequence of the recapitulation, the definitive imperative decree is delivered,

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the burthen of the costs caused by the delay so produced will be imposed by the judge on the parties, in such proportion as to him seems meet.

If it be at the motion of a party that the recapitulatory trial takes place, and such motion of the party is sincere (the judge not being an object of his distrust,) it will have had for its cause a hope that when, with a quasi-jury to insure a more attentive consideration, the judge has furnished his mind with this ulterior stock of instruction, his decrees will, on this second occasion, be more favourable than they were at the first.

If the party be insincere, the act in question may have had other causes. Examples are: — 1. Material evidence, which had been unfavourable to his side of the suit at the original examination, is no longer forthcoming. 2. The delay, vexation, and expense, inseparable from such ulterior examination, is such as the party on the other side would not be in a condition to support.

Supposing the first of these cases to have place, the fact in question being ascertained, it may constitute a sufficient ground for refusing the recapitulatory examination — or rather for receiving, on the occasion of the second examination, the minutes of the evidence delivered on the former occasion, in lieu of a second oral examination of the same witness, performed in the course of the recapitulatory examination.

If by a party on either side the performance of the recapitulatory examination be objected to, on the ground of his being unable to defray the ulterior expense, this may be a sufficient reason for the refusal of it, unless the party or parties requesting it will provisionally take upon themselves the expense, and make compensation for the delay and vexation in other shapes.

Subsequently to the conclusion of the recapitulatory examination, and antecedently to the exercise of his opinatively-decretive and imperatively-decretive functions, the judge addresses to the quasi-jury his recapitulatory statement.

Of the topics touched upon in the judge's recapitulatory statement, examples are as follows: —

I. On the pursuer's side of the suit —

1. His demand, that is to say, the service demanded by him at the hands of the judge.

2. His ground in the field of law, and whether real law, or fictitious law.

3. His ground in the field of fact: individual facts, the existence of which he asserts as belonging to a class of facts designated as giving to a person (being of the class of persons mentioned for that purpose, of which he says he is one) a title to receive at the hands of the judge the service prayed, at the expense and charge of the person or persons on the other side of the suit. By the portion of law in question, added to the facts the existence of which is asserted, is composed the efficient cause of the pursuer's right, or say title, to the service which he demands.

4. Evidence adduced by him in proof of the facts, the existence of which at the times and places in question was asserted as above.

5. Arguments employed on the pursuer's side; namely, on the question of law, the question of fact, or both; arguments having for their object the inducing the persuasion that the import intended by the law is the import he ascribes to it; and that the facts, of which he asserts the existence, did at the time and place in question exist accordingly.

II. On the defender's side of the suit —

1. His defence, if any, consisting either of the denial of the justice of the demand; or of the counter-assertion of some portion of law, or matter of fact, the effect of which is (admitting the demand to have been just) to produce the extinction of it.

2. If denegatory in respect of the matter of law, thereupon comes his counter-interpretation of the portion of law referred to on the pursuer's side.

3. If denegatory in respect of the matter of fact, thereupon comes counter-evidence.

4. Counter-argument.

5. If the defence has been counter-assertive, thereupon comes on this side the same topics as those on the pursuer's side.

The state of the case, according to the judge's conception of it, being thus brought to view, follow such observations, if any, as in his eyes are necessary or useful, to render apparent the aptitude of the decrees, opinative and imperative, which he has it in contemplation to pronounce.

Next and lastly follows the tenor of these same decrees, accompanied or followed by such further observations or comments, if any, as in his eyes promise to be conducive to that same purpose.

CHAPTER XXVIII.

APPEAL AND QUASI-APPEAL.

§ 1. *Appeal and Quasi-appeal, what?*

APPEAL is where, a definitive imperative decree having been pronounced by a judge-immediate, application is made by a party to a judge-appellate, requesting him to reverse or modify it.

Quasi-appeal is where, by the judge-immediate no definitive imperative decree has been as yet made; but by something which has been done, or omitted to be done by the judge-immediate, such effects have been produced as that, in disfavour of the quasi-appellant, the same effect has been, or is about to

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be produced, as would have been produced by a correspondent imperative decree.

A quasi-appeal is therefore a petition praying for relief, in a case in which by relative inaction, that is to say, for the want of some appropriate decree, and execution and effect thereto given, the quasi-appellant has suffered, and is suffering, a wrong to the same effect as if an imperative decree in his disfavour had been issued and executed.

If by relative inaction, the effect of a positive decree in disfavour of a party is produced, it will be by means of the want of forthcomingness on the part of some thing or things, person or persons, either to the purpose of justiciability, or to the purpose of evidence.

If it be for want of forthcomingness for the purpose of evidence, the justificative cause of complaint will be because, had the piece of evidence in question been forthcoming, it would either of itself or in conjunction with some other piece or pieces of evidence, have been at once sufficient to form an adequate ground for the definitive decree, which, on the side of the party in question, it is the object of the suit, or the defence, to obtain from the judge.

If it be for the want of forthcomingness for the purpose of justiciability, it will be because, had the thing or the person in question been forthcoming, execution and effect might in a certain shape have been given to a decree in favour of the party by whom it was prayed for in the course of his pursuit, or his defence, as the case may be; whereas for want of it, neither in that same shape nor in any other adequate to it, could such execution and effect be given to such decree, if issued.

Of forthcomingness on the part of persons and things, for the purpose of justiciability, examples are as follows:—

1. Production of a person within the physical power of the judge for the purpose of his being eventually placed within the physical power of a party: of the person of a wife, for the purpose of her being placed under the physical power of her husband: of a child, under the physical power of his or her father, or other guardian.

2. Production of a thing claimed by a pursuer for the purpose of its being placed under the physical power of such pursuer: production of a mass of property belonging to a defendant, for the purpose of its being sold in the way of auction, by an appropriate functionary of justice, to the end that the produce of the sale may be delivered by him to the pursuer, in satisfaction for a debt due to him from the defendant.

If for want of such dispatch as could have been and ought to have been given by the judge immediate, irreparable injury, by want of forthcomingness of some person or some thing (whether for the purpose of evidence or for the purpose of justiciability,) is produced, such judge is responsible, non-penally, or even penally, or in both ways, as the case may be.

Of incidents whereby forthcomingness, which in regard to a thing necessary as a means of satisfaction or of punishment, or of evidence, might within the proper time have been effected, but which by the lapse of that same time has been rendered impossible, examples are as follows:—

1. Expatriation—the thing carried out of the power of the whole judicial establishment, as well as of the particular judicatory in question.

2. Latentcy—the place in which the thing is, unknown; namely, to those whose knowledge of the place where it is, is necessary to the forthcomingness of it.

3. Deperition.

4. Relative deterioration.

Of occurrences whereby as a means with relation to the like effect, relative forthcomingness in the instance of a person may have been rendered impossible, examples are as follows:—

1. Expatriation.

2. Latentcy.

3. Insolvency.

4. Death.

5. Relative deperition or deterioration of appropriate faculties.

In so far as it is in the character of a source of evidence that the thing or the person might and would have been made to minister to the purposes of justice—to rectitude of decision, in the case in question, the causation of non-forthcomingness has the effect of suppression of evidence; suppression, of which on one side the effect may have been the same as forgery of evidence—namely, as forgery of evidence having with the same force the opposite tendency.

§ 2. *Grounds for quasi-appeal.*

Necessary to the actual execution of any ordinance of the law, in conjunction with the means of proof, the means of execution, and the means of appropriate communication on the part of all pursuers, on whom the result depends,—are the *disposition* and the *power* to employ them to that purpose with effect. Suppose these requisites, all of them to have place—you suppose the effect to have place: suppose any one of them not to have place—you suppose the effect not to have place.

By delay, by what cause soever produced, whether by purely physical agency, or human agency; if by human agency, whether avoidable or unavoidable; and if unavoidable, whether with or without blame,—the effect of misdecision may in any one of these cases alike

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be capable of being produced. In so far as it is unavoidable, there is nothing to be done — in so far as it is avoidable, thereupon devolves upon the legislator the care of preventing it: of preventing it, and in so far as blame is attached to the existence of it, punishing it in an effectual manner.

By precipitation, the shapes in which the effect of misdecision, ultimate or antecedent, is also produced, are as follows: —

All the several modes in which, as above, it is producible by delay. For suppose, for example, an ultimate decision pronounced at a time when either the requisite means of proof or disproof that could have been employed, have not been employed, or some necessary means of execution, which, but for this promptitude of the decision, might have been employed, have failed to be employed: in this case likewise, the decision pronounced will either be misdecision, or be productive of the same effect as if misdecision had had place: an effect opposite to that which would have had place, had due execution been given to the law, may in consequence have had place.

In comparison with delay, promptitude has the advantage of not being, as delay essentially is, productive of vexation and expense, in addition to misdecision or the evil effect of it.

On the other hand, instances occur, in which by precipitation, misdecision, actual or more or less probable, is capable of being produced, in cases in which delay is scarcely of itself capable of being productive of the like effect.

Cases may on any sort of occasion have place, in which, to the rendering of a right decision, and consequently to the avoidance of misdecision, one or both of two things for the guidance of decision are necessary. These are —

1. Argumentation; hearing or reading from the lips or pens of others, such observations, whether on the question of law, or on the question of fact, as may be necessary to the placing the matter of fact or the matter of law in a clear light.

2. Consideration; which is, in effect, an operation of the same sort as that of argumentation, with only this difference, that the mind of the judge is the only seat of it.

A ground for a quasi-appeal, is any act affirmative or negative, on the part of the judge below, — any act affirmative or negative, the effect of which is or would be to place the quasi-appellant in the same situation as if an undue definitive decree in his disfavour had been issued and executed, or but for the remedy demanded by the quasi-appellant, would be.

Referable to one or other of the heads following, is every judicial act having the effect of misdecision: —

1. Denial, declared or virtual, of means of proof; to wit, either in the aggregate, or in the instance of some one understood and assignable means or article of evidence.

2. Denial, declared or virtual, of some means of execution, actual or eventual, in possession or in expectancy.

3. Denial, declared or virtual, of some means of communication necessary to the obtainment of some means of proof, or of some means of execution or acquittal in time for the purpose.

4. Denial, declared or virtual, of means of defence, actual or eventual, in possession or expectancy.

5. Undue delay, whereby the obtainment of some means of proof in appropriate time, or of some means of execution, actual or eventual, in a direct way, or by withholding of some means of communication, is prevented or unduly retarded.

6. Undue precipitation, whereby the obtainment or use of some means of proof, execution, or communication as above, or of some means of elucidation in the way of argument, is prevented.

Wrong, in these its several shapes, has its correspondent remedy, which, if the quasi-appeal be well grounded, it belongs to the appellate judicatory to apply; as also to each such remedy, its correspondent petition or demand.

1. For denial of means of proof: remedy, imperative decree, ordering supply of means of proof, in the shape belonging to the nature of the case, and determined by the appellate judge, either in exact compliance with the terms of the demand made by the quasi-appellant, or in conformity to his own more or less different views of what the case requires, as expressed in his correspondent opinative decree. Name of the correspondent demand, — Petition for supply of means of proof.

2. For denial of means of execution: remedy, imperative decree, ordering supply of means of execution, in the shape belonging to the nature of the case, and determined by the appellate judge, either in exact conformity with the terms of the demand made by the quasi-appellant, or in conformity to his own more or less different views of what the case requires, as expressed in his correspondent opinative decree. Name of the correspondent demand, — Petition for supply of means of execution.

3. For denial of means of communication: remedy, imperative decree, ordering supply of the means of communication, in the shape belonging to the nature of the case, and determined by the appellate judge, either in exact compliance with the terms of the demand made by the quasi-appellant, or in conformity to his own more or less different views of what the case requires, as expressed

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in his correspondent opinative decree. Name of the correspondent demand, — Petition for supply of means of communication.

4. For denial of means of defence: remedy, imperative decree, ordering supply of means of proof, or means of judicial assistance, for the purpose of information, advice, or argument, in the shape belonging to the nature of the case, and determined by the judge-appellate, either in exact compliance with the terms of the demand made by the quasi-appellant, or in conformity with his own more or less different views of the case, as expressed in his correspondent opinative decree. Name of the correspondent demand, — Petition for supply of means of defence.

5. For undue delay, whereby timely obtainment of means of proof or execution, or means of acquittal or defence, may have been prevented; and on the pursuer's side execution, and on the defendant's side acquittal, are at any rate retarded: — remedy, imperative decree, ordering dispatch, either in exact compliance with the terms of the demand, or in conformity with the more or less different views of what the case requires, as expressed in the correspondent opinative decree. Name of the correspondent demand, — Petition for dispatch.

6. For undue precipitation, whereby obtainment of means of proof, means of execution, means of communication, means of elucidation by argument, or means of acquittal or defence, have or may have been definitively or temporarily prevented, — Petition for reversal, with such particular remedy as the case may require.

In a certain case, over and above vexation and expense by delay, the effect of misdecision may be produced. This is when the period within which a means needful, and of itself, in conjunction with other means, sufficient to give execution and effect to the portion of law in question, might have been obtained, has been suffered to elapse: rectitude of decision is thereby rendered impossible, and misdecision is made to take its place. Say for shortness, — through delay, misdecision necessitated; or, through delay, right decision impossibilitated.

Of other competent grounds for a quasi-appeal, examples are as follows: —

1. Non-allowance of the faculty of taking a transcript of the record, or of so much as to constitute a sufficient ground for his petition.

2. Out of the record, omission of some particular which ought to have been inserted.

3. In the record, insertion of some portion of discourse not conformable to the truth.

4. In the record, substitution of some portion of discourse not conformable to truth, to some portion of discourse conformable to truth which ought to have been contained in it.

5. Insertion given in the record to matter irrelevant, or otherwise immaterial, whereby to the labour or expense of transcription a needless addition has been made.

In each of the above cases, the mischief from the wrong will of course depend upon its effect on the issue of the suit. In so far as things can be placed in the same state as they would have been in had the wrong not been done, — to place them in that state will be the appropriate remedy: in so far as this cannot be done, compensation at the expense of the wrong-doer, and of all concerned in the doing of the wrong, will be the remedy required.

The provision here made supposes, that the relief here allowed to be prayed for at the hands of the appellate judge, has in substance been denied by the immediate judge.

The hearing before the quasi-jury is the stage at which, if at any, arguments in form, with or without professional advocates, are heard.

If on any occasion the decision of the judge fails of being acceptable to a party on either side, that is the stage at which he prefers to the appellate judicatory an appeal, or a quasi-appeal.

The quasi-appeal is, as has been seen, a petition in any one of the six forms just mentioned. It is called a quasi-appeal, because though not in any one of those instances what has been commonly understood by the word appeal, yet in every one of them, the effect which it seeks to produce is the same as that which (in the case of success) is produced by it; — the remedy producing in favour of the complainant an effect which is the opposite of that which would have been produced by the alleged grievance complained of.

Of everything that passed, as well on the original examination as on the recapitulative examination (if being granted, it take place,) minutes will be to be taken on this occasion, as on the others, by the registrar: so likewise may they by any and every person so disposed.

In this case, they may eventually form a ground of accusation against the judge, either before the justice-minister, or before the public-opinion tribunal, with a view to eventual dislocation, as per Chap. XXII. *Appellate Judicatories*, Constitutional Code.

If by reason of non-compliance with a petition for a supply either of means of proof or means of execution, — misdecision or non-decision, misexecution or non-execution, shall have taken place, the judge by whose default misdecision or the equivalent of it shall have taken place, is responsible compensationally, or even punitionally, by decision of the justice-minister, if such failure has had evil consciousness or rashness for its accompaniment.

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§ 3. *Uses of Appeal.*

What is the use of appeal? If judges who act in the first instance are subject to error — are liable to be deficient in appropriate aptitude — so are those who act in the second instance: and from the mere circumstance of their being set to work after the first, what ground can you have for the expectation of a higher degree of aptitude on the part of the second?

Answer: The use is, that one set of judges may have another to stand in awe of — a set in whose instance, if on any occasion it happens to him who acts in the first instance to be actuated by sinister interest, in whatever shape (love of ease included,) there will be another who, by the love of power as well as the sense of obligation, will be naturally disposed to correct his errors.

The purpose might therefore be in a main degree answered, if the functions were reversed: the immediate judges made appellate only, and the appellate judges made immediate only.

Hence one reason why immediate jurisdiction should not be given to appellate judges; for if it were, there would be none of whom they would stand in awe.

From immediate judges, arbitrary power is taken away, by the setting of appellate judges over their heads.

From appellate judges, arbitrary power is taken away by their not having the initiative; and because, if they make any undue alteration in the decrees pronounced by the immediate judges, there stand already those same decrees, with their respective reasons, constituting a standard by which the operations of the appellate judges will be tried by the public-opinion tribunal, as the operations of the immediate judicatory have been by the appellate.

When once it is established that there ought to be two sets of judicatories, one above another, it is better that those who have had most experience should sit in judgment over those who have had the least, than those who have had the least, over those who have had the most. But rather than there should not be two different sets, those of one set sitting in judgment over the acts of those who have acted in the first instance, it were better that appeal should in particular cases go from the appellate to the immediate judicatories, than that there should be no appeal from the appellate — than that there should be any judge whose proceedings there should be no other judge to take cognizance of, with a power of eventual correction.

Not having had the advantage of hearing the orally extracted evidence, while the immediate judge has had that faculty, the appellate judge is empowered, it may be observed, to reverse the decree of the immediate judge in respect of the matter of fact, although his means of coming at the truth are so much less efficient: and as the public-opinion tribunal at large is so circumstanced as not to have the possibility of availing itself of those superior means, any more than the appellate, to whom those means are denied, why not leave the power of determining the fate of the cause in the hands of those whose means for forming a right judgment are so much superior to any that can be employed either by the judge above, or by the ultimate superiors of the highest grade — the possessors of the constitutive authority, in their character of members of the public-opinion tribunal?

Answer: The least important advantage must yield to the most important. A check applied by superordinate authority to a power which would otherwise be arbitrary (placing everything dear to man in the hands of an unchecked functionary or set of functionaries,) is a security too indispensable to be foregone on any account whatever. The advantage, from vesting the power of deciding on the question of fact in the hands of the same individual by whom the evidence in relation to it has been received and collected, would be indeed a very considerable advantage; but in point of importance, this cannot enter into competition with the other. In all probability this advantageous union will have had place in the great majority of the whole number of instances; only comparatively in a small proportion, will appeal have place; and of those cases in which it has place, only in a very small proportion will the appellate judge think fit to substitute his opinion to that of a judge whose means of judging the whole matter have been to such a degree more instructive than his. In this case, it is not for what he is likely to do, — it is only for what it will be seen that in case of necessity he has it in his power to do, — that the faculty of undoing what the immediate judge has done, is put into his hands.

By the public-opinion tribunal the exercise of a power thus extraordinary, is not likely to be left unwatched. The party in whose disfavour it is exercised, is not likely to be backward in complaining of any abuse, with which in his opinion it can be made chargeable.

In all the cases in which power is given to the appellate judge, of reversing the decrees of the immediate judge, on the ground of the evidence as it stands upon the record, power is also given to him to send the question of fact to be tried over again in a neighbouring judicatory: the orally extracted evidence, (which is the only sort of evidence to which the question applies) to be there extracted anew — such of it as remains still obtainable. This option, in case of his disapproving of the

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decrees below, it will be naturally expected that he should embrace, where the importance of the suit is such as to warrant the additional expense; and it is manifest how considerable the reduction is which will require to be made from this source, from the number of instances in which the decrees of the original judicatory are likely to undergo material change.

Number of cases in which appeal may be made, say 100; of these, the number in which the decree below undergoes alteration in consideration of the opinion formed on the question of fact, 10: of these ten, the number of those in which, without sending the question to another trial, reversal or other material alteration takes place, two. What is the consequence? Answer: That notwithstanding the power of reversal lodged in the appellate judicatory, the fate of the suit is decided, in 24 instances out of 25, by the immediate judge.

If the union in question is to such a degree beneficial as above supposed, the more beneficial it is, and is seen to be, the greater will be the degree of confidence reposed by the public-opinion tribunal in a decree passed by a judge by whom this advantage has been possessed, as compared with that reposed in the decree of a judge by whom this same advantage has not been possessed. Thus, then, the strength of the check rises in proportion to the demand for the application of it.

The greater the extent to which the public-opinion tribunal keeps itself in accordance with the opinion expressed by the decrees of the judiciary establishment, the more perfectly will the system of procedure fulfil the ends of its institution.

If, instead of committing the second trial to another judicatory, the appellate judge had the power of receiving and extracting the orally delivered evidence in his own person, and to decide in dernier resort on the ground of the evidence so collected and extracted, his power would thereby be unchecked and arbitrary as above; there being no other authorized to reverse or modify it. But suppose the second trial to be by another judge immediate, the decree of the second judge immediate would, in the same manner as that of of the first, be subjected to reversal or modification at the hands of another judge, namely the judge appellate, and thus saved from the charge of arbitrariness.

Stages of appeal, why not more than one? Answer: Because by a single one, the beneficial effects above mentioned are secured: and by every additional stage, the evil opposite to the collateral ends of justice would receive vast increase, while to the obtainment of the direct ends of justice no additional probability would be given.

Question: Why allow modification or reversal of the decree of the judge-appellate in case of his being actually punished, and not otherwise?

Answer: Because if the decree might be reversed or modified without the judge's being actually punished, criminality would be imputed by the appellant as a matter of course, for the mere purpose of obtaining the right of appeal; and by wrongdoers in possession, frequently for no other purpose than that of increase of delay, vexation, and expense.

Question: Why not allow the appellate judicatory to have for its decrees any other ground than what has been afforded by the record of the proceedings of the immediate judicatory?—why not allow it to examine fresh evidence?

Answer:—1. The proper point of view for the appellate judicatory to contemplate the evidence and other proceedings in, is that in which alone the public-opinion tribunal can contemplate them.

2. Only from such evidence and grounds as he had before him, can the appellate form any just conception of the conduct of the immediate judge.

3. If the case be such, that subsequently to the decrees of the immediate judicatory, fresh evidence impugning the decree has come to light, it is to the immediate judicatory that it ought to be presented, and not to the appellate. If presented to the appellate, without passing through the immediate, the evidence would not have the benefit of an examination before a quasi-jury.

If it is for want of evidence that might and should have been contributed to and received by the immediate judicatory, that a supposed misdecision has taken place, the remedy that should be applied is a petition to the immediate judicatory— a petition for supply of evidence; of which petition, the denial forms a ground for quasi-appeal.

§ 4. *Proceedings before the Appellate Judge.*

On the occasion of a petition for a supply of evidence, the party gives indication of the source from whence the evidence is desired, and states the terms in which it is his desire that the appropriate imperative decree should be expressed; adding, in case of non-compliance, a petition for the hearing of the former petition before a quasi-jury.

On the occasion of a petition for securing eventual forthcomingness of means of execution, the party gives indication of—1. The existence of the objects; or, 2. The articles in question, with their general description; 3. The necessity of apt arrangements for securing their eventual forthcomingness; and, 4. The terms in which it is his desire that the appropriate imperative decree shall be expressed; adding, in case of non-compliance, a petition for hearing as above, before a quasi-jury.

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On the occasion of a petition for a recapitulatory hearing before a quasi-jury, appointment is prayed of a day and time on which the hearing shall have place.

On the occasion of a petition for dispatch, the party gives indication of each particular operation or set of operations which it is his desire to see performed, and states the terms in which it is his desire that the imperative decree for the performance of it shall stand expressed; adding, in case of non-compliance, a petition for hearing as above, before a quasi-jury.

On the occasion of a petition for right execution, he states the particulars in which the execution given to the imperative decree in question has failed of being conformable to it; adding, in case of non-compliance, petition for a hearing before a quasi-jury.

On the occasion of a petition for execution, he states the time and manner in which it is his desire the execution should be performed; adding, in case of non-compliance, petition for a hearing before a quasi-jury.

At the time appointed for argumentation, the official respondent on the appellant's side declares whether he does or does not see any objection to the decision appealed from: if he does not, the decision is confirmed, unless the appellate judge of himself sees any sufficient specific ground, which he declares accordingly, for reversal or modification: if the declaration of the official respondent be in the affirmative, he thereupon states his objections, and argues in support of them; and upon hearing the argumentation on both sides, the judge appellate decides.

If on either side the party, or any substitute, professional or non-professional, deputed by him, appears and argues, the duty of the official respondent does not take place on that side.

In a penal suit, if the appellant, being the defendant, is not in a state of incarceration, he is at liberty to repair to the appellate judicatory, and make representation in his own person, as well as in the person of a substitute, professional or non-professional.

So, if he is in a state of incarceration, on paying the expense of conveyance in custody, unless his case be of the number of those in which, to warrant appeal, the fiat of the quasi-jury is necessary: neither in this case is he transferred to the appellate judicatory, unless for such transference a separate fiat from the quasi-jury be granted.

In a penal suit, if the decision of the immediate judicatory be simply confirmed without modification, to prevent undue delay, and on the part of the pursuer groundless vexation and expense, the defendant will be liable to additional punishment as of course; but with power to the judge-appellate to remit it in the whole or in part, for specific cause assigned. In regard to the quantum of such punishment in the several cases, provision will be made elsewhere. On this occasion, the minimum of that which will suffice for the prevention of insincere appeals is all that will be appointed.

In every case alike, where the quasi-appeal is regarded as groundless, or not sufficiently grounded, the appellate judge issues his opinative decree, Quasi-appeal (naming it;) to wit, Petition for supply of means of proof, for means of execution, &c., groundless, or not sufficiently grounded. Terms of the imperative decree addressed to the judge below. Proceed to execution, or proceed to acquittal; as the case may be.

If, from what appears on the face of the record, the nature of the case is such, that wrong in one or more of the above shapes having been committed, the appellate judge can see what is the proper issue of the suit, he declares as much, and decrees accordingly; giving such definitive decree as might have been given had the definitive decree been pronounced by the immediate judicatory in disfavour of the party wronged, and an appeal made against it in consequence.

If no such conception can be obtained, he declares so much by his opinative decree, and by an imperative decree orders a new quasi-trial, if that can afford a remedy, in the same judicatory or another, as seems to him most apt.

In any case, for injury in whatever shape produced by the wrong, he orders compensation.

§ 5. *Checks.*

Except as to the differences resulting from difference of situation, the checks applied to conduct, and thence the several securities established against misconduct, in the case of the immediate, have place in the case of the appellate judge.

These differences are as follows:—

In the case of the judge-appellate, to the security afforded by the obligation on the part of the judge-immediate principal to have served in the capacity of judge-immediate depute, is added that of having served in the capacity of judge-immediate principal.

Modified in the case of the judge-appellate, is the check applied in the case of the judge-immediate, by the attendance of law students in the visitors' gallery. Antecedently to the admission to practise in the appellate judicatory, to the five years of attendance requisite to admission to practise in the immediate judicatory, are added [ ] months and no more, of attendance in the appellate judicatory.

In the case of a judge-appellate, the check which, in the case of a judge-immediate, as applied to the virtual appeal from a judge

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without a jury, to a judge in the same judicatory with a jury, cannot have place: a judge-appellate not hearing anything without a jury.

In the case of an appellate judicatory, the check applied by appeal to a superior judicatory has no place: except in the case in which the part allotted in ordinary cases to an immediate, is performed by the appellate judicatory, such as that of a complaint, of the number of those registered in the incidental complaint-book. In this case, from the decrees of the appellate judicatory, appeal lies to the justice-minister.*

To the situation of judge-appellate, the check applied to the situation of judge-immediate, by his dislocability by the judge-appellate, is obviously excluded by the nature of the case.

As to dislocation: dislocable is an appellate judge, not by the electors of any subdistrict, but by those of the district or assemblage of districts over which his local field of service extends.

There follows, as to undue delay, a check not applicable to the case of an immediate judicatory. If within a certain length of time after receipt of the record, no decree has by the appellate judicatory been pronounced, the decrees of the immediate judicatory are thereupon understood to be confirmed: and if, after receipt of notice given of the lapse of the interval to the registrar of the appellate judicatory, and due time, to wit [ ] days, allowed for inhibition therefrom, no such inhibition has been received, execution is forthwith given by the immediate judge to his decree.

So, if in the mean time application for argumentation has been publicly made to the judge-appellate by a party on either side, and the faculty of argumentation has been refused, namely, directly or virtually, by non-appointment of day and hour, or by omitting to hear argumentation after appointment,—to the registrar it belongs to make entry thereof on the record, antecedently to retransmission made as above.

So, if to application publicly begun to be made, the judge-appellate should refuse ulterior audience. Such refusal would moreover be a punishable offence, and might be denounced as such to the justice-minister, and thereby to the public-opinion tribunal, to pave the way for eventual dislocation.

§ 6. *Options of Judge-appellate as to Judge-immediate.*

On view of the record, after entry made of his decrees opinative and imperative, in relation to the suit brought before him, whether in the way of appeal or in that of quasi-appeal, the judge-appellate will subjoin an opinative decree on the subject of the conduct of the judge below. The options given to him on these particulars are expressed in the words which follow: —

1. Judgment supposed erroneous, as expressed, — in respect of intention, conduct blameless.

2. Judgment supposed erroneous, as expressed, — mind supposed not sufficiently attentive: follows a statement, declaring the passages in which this opinion has had its ground.

3. Decree erroneous, as expressed. Suspicion is entertained of a deficiency in respect of appropriate aptitude, stating in which branch, moral, intellectual, or active, as the case may be: follows a statement, declaring the passages in which the opinion has had its ground.

If the last of those options be embraced, the judge-appellate transmits the record, or a transcript thereof, to the justice-minister, who thereupon acts as per Chap. XXII. Constitutional Code.

§ 7. *Evidence discovered after ultimate decrees, how far producible.*

In relation to any matter of fact, what may sometimes happen is, that after a suit instituted and terminated, evidence transpires, by which, had it been received in time, decrees opposite to those by which the suit has been terminated would have been pronounced. In such cases, the proper judicatory to apply to is the judicatory in which the suit has been so terminated. But in such a case, exceptions excepted, the judge will not grant and appoint a fresh recapitulatory quasi-trial, unless, upon examination of the party applying, he is satisfied, that of the evidence in question the party had not, antecedently to the utterance of the definitive decrees in question, any knowledge.

Exceptions are as follows: —

1. Where, though at the time in question he did not either tender or require the extraction of the evidence in question, he gave indication of the existence of it — the non-production of it having for its cause the conception of the adequacy of the mass of evidence actually adduced, coupled with the desire of avoiding the delay, vexation, and expense inseparable from the production of it, and the persuasion of the non-necessity of it as above.

2. Where, antecedently to the termination of the suit as above, the existence of a certain article of evidence material to the corroboration of an article of newly discovered evidence, was known; but the newly discovered evidence itself not being known, the materiality of it could not be then known,—

* Of this case, exemplifications, it is obvious, if ever they occur, will in all probability be extremely rare.

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the reason for giving indication of it had not place therefore at that time.

Examples of such demand for subsequently and accidentally - discovered evidence, are as follows: —

1. Field of law the non-penal branch. — Subject-matter of suit, aggregate mass of the property of a person recently deceased: — Ground of decision, testament of a certain date: — fresh evidence subsequently discovered, a testament of posterior date, in the custody of a person whose existence or chief abode was not at the termination of the suit known to the party on whose behalf the fresh examination is required.

2. Field of law the penal branch. — Defendant in a penal suit for homicide: quasi-trial, after recapitulatory examination, and by appropriate decrees opinative and imperative, acquitted. Evidence the existence of which was neither known nor suspected, afterwards comes to light. Examples: —

1. The defendant, in contemplation of death, smitten by remorse, confesses, but recants.

2. In a fit of drunkenness, or in his sleep, defendant utters particulars which lead to the discovery of evidence, the existence of which had not been suspected.

3. Habiliments, or other goods known to have been the property of the deceased, are discovered in the possession of the defendant: or the dead body, or the skeleton, known by some peculiar marks to have belonged to the deceased.

4. An individual who, in relation to the transaction by which the death was occasioned, had been an eye-witness; or in relation to some fact probatively operating as an article of circumstantial evidence, returns from beyond sea, and makes known what he saw.

§ 8. *Security against undue punishment of an irreparable nature.*

Without express confirmation by the appellate judicatory and the justice-minister, no imperative decree, ordering, under the name of punishment or otherwise, irreparable change in bodily condition, shall be considered as intended to receive execution. Examples of such change are the following: —

1. Mortal punishment.

2. Mutilation: loss of the substance, or use of a portion or organ of the body.

3. Stigmatization: understand, when performed in such manner that the effect shall be indelible.

4. In the case of a female, defloration: as where, on the termination of a suit, antecedently to known consummation, a female is ordered to be delivered into the power of a man adjudged to be her husband.

For the completion of the list, see the non-penal and penal Codes.

CHAPTER XXIX.

NATURAL AND TECHNICAL SYSTEMS COMPARED.

ONE main feature of natural procedure is a special regard to avoid adding to the suffering of the innocent, the indigent, and the (for whatsoever cause) afflicted: corresponding feature of technical procedure, blind oppression of the innocent, the indigent, and the already afflicted.

Examples: — Indiscriminate imposition of the burthen of costs in all stages, from that of accusation to that of execution inclusive.

To this head belong all fees exacted of persons imprisoned on mesne process, and thence before conviction: as well as on imprisonment in consequence of conviction.

The infinitely diversified, but in most cases enormous length of time, during which, in consequence of accusation, and before trial, in cases liable to incarceration, persons are subjected to it.*

In all cases of penal procedure, the declared supposition is, that the party accused is innocent; and for this supposition, mighty is the laud bestowed upon one another by judges and law-writers. This supposition is at once contrary to fact, and belied by their own practice.

The defendant is not in fact treated as if he were innocent, and it would be absurd and inconsistent to deal by him as if he were. The state he is in is a dubious one, betwixt non-delinquency and delinquency: supposing him non-delinquent, then immediately should the procedure against him drop; everything that follows is oppression and injustice.

Of this oppression, the immediate cause is the enormous interval, so wantonly interposed between one part of the procedure and another. This is a consequence of the unfeeling disregard above mentioned; of that disregard, the original sin of judicial procedure (more or less flagrant perhaps in all countries, but more particularly in England;) the substitution of the actual ends of judicature to the ends of justice.

To such a length has this disregard proceeded as to have produced a tax, and that to an enormous amount, on what are called free pardons.† For pardon (though under English

* This applies with more or less force to the whole of England not within the jurisdiction of the central criminal court. — *Ed.*

† These free pardons were formerly under the Great Seal. The expense of obtaining these documents was so great, that they were seldom or never applied for, except when in the course of some suit or other it became necessary to prove the fact of the pardon of the individual in question. Now, by a statute passed during the reign of George IV. (7 & 8, c. 28, § 13,) a pardon under the sign-manual has the same effect as

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law altogether arbitrary,) there are several incontestably proper causes. As to this, see Constitutional Code, Chapter XXV. *Justice Minister*, § 5. *Dispunitive function.*

Oppression of the indigent, grievous in proportion to their indigence. Oppression in this shape has for its cause, the employment given to fixed sums, on whatsoever accounts imposed (viz. penalty for delinquency in its various shapes) by substantive law: taxes and fees to functionaries of both sorts, judiciary and professional, under procedure law.

The effect which blind fixation has in giving encouragement and birth to crime in all manner of shapes, is a topic of animadversion elsewhere. What belongs to the present occasion is the effect it has on the suffering of the absolutely or comparatively indigent, an effect which goes to the rendering the suffering of one individual, rise to some thousand times the amount of the suffering of this or that other, from a cause nominally, and in the eyes of a careless observer, the same.

The case mentioned as the case of the already afflicted, belongs more particularly to that in which the offence is not considered on the footing of a criminal one, but only as injurious, and thus producing a demand for compensation. If prevention of such offences were the end in view, matters would be so managed, as that whatever expense were imposed or left unremoved, should *antecedently* to decision be minimized, and after decision thrown with its whole weight (state of pecuniary circumstances considered) on the party in the wrong, in the case of rashness; with a purposed addition in case of evil consciousness.

Between operation and operation in the course of the suit, beginning with the first, whatever that may be, long intervals are established by general rules, without regard to the difference in respect of length of intervals, rendered necessary to justice by the circumstances of the several individual cases.

These intervals are fixed in regard to time, without any regard to distance in respect of place.

By general rules, transference from judicatory to judicatory and back again; thence vast delay, vexation, and expense, without any benefit: on the contrary, with great detriment to justice in respect of avoidance of misdecision, by breaking the thread of the evidence, belonging to the suit; appointing one part to be elicited by one judicatory in one place; another part by another judicatory at another place; and the other parts at the judicatory in which the suit commenced.

Mode of proceeding, by action at common law. In the three common-law judicatories of the metropolis—the King's Bench, Common Pleas, and Exchequer—the mode of procedure in this case is not very materially different.

First comes the writ. But the only end and effect of this is to cause the defendant to appoint an attorney to carry on the suit in his stead. Here the instrument of summons, warning, notice, or whatever it may be called, is at a fixed price (or at any rate at a price that ought to be fixed,) purchased of a subordinate instrument and justice-seller of the judge—the judge himself never knowing anything of that which in this way is done by his authority, and in his name.

Next comes the declaration. But this, though an assertion, and though in that character effect is given to it, is not considered in the character, nor designated by the name of evidence. It has always more or less of falsehood in it. The attorney (for the party never knows any more of the matter than the judge does) utters this falsehood knowingly and wilfully, and without any apprehension, because without any danger of suffering from it. For the utterance of it, he and his instrument and accomplice, the special pleader, are well paid: and except the receiving of this pay, the only effect of it is to elicit, under the name of a plea, the corresponding mass of falsehood and absurdity, from the attorney in league with a special pleader on the other side.

Thus continues the chain of falsehood and absurdity, from mouth to mouth, and from year to year, between one link and another; there being in particular four long intervals, one of them of the length of three or four months, lest the suit should come too early to a close. All this while no assertion made, which under the name of evidence is admitted to constitute a ground for the ultimate decision, by which execution and effect is given or denied to the portion of law on which the demand is as by the declaration professed to be grounded.

If the instrument put forth in the first instance by the defendant, in answer to the plaintiff's declaration, is of such a nature as to come under the denomination of a general issue, of which according to the nature of the demand there are five or six sorts, there is another tissue of useless falsehoods and absurdities, and the suit goes to some place in every variety of distance, between 0 feet, and about 300 miles, from the place at which it was commenced, to be tried; that is to say, now for the first time is any mass of assertion received, to which, as above, the character and effect of evidence is ascribed. Here for the first time, a functionary bearing the title of judge takes (unless by accident as hereafter mentioned) cognizance of the evidence of anything that has passed in the

if it were under the great seal. Pardons so attested are, I believe, granted without any charge.—*Ed.*

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course of the suit. This judge is not necessarily the judge under whose authority the suit was commenced, or the power of compelling the adverse party to act in the character of a defendant, sold. For the useless course of falsehood and absurdity, months in large numbers as above, or years in small numbers, are allotted: for the elicitation of the only mass of assertion which is so much as professed to be taken for the ground of decision, sometimes not more than two or three days, for all the number of suits that can come to be heard in the same place, are allowed. Upon an average, not more than two or three times as many hours are allotted, for the only mass of information which is or can be applied to use, as the number of months or even years that are allotted to the elicitation of that which is so completely useless.

Proceedings by indictment: — Here a new scene opens. The case where the proceedings by indictment are preceded by proceedings before a justice of the peace — this case not covering more than a part of the field covered by the mode of procedure termed an *indictment*, must for the present be postponed. Here the scene opens with the proceedings before the grand jury. The grand jury is a judicatory not presided over by a professional and permanently existing official person, a judge; but a company, a miscellaneous company of men, selected on the presumption of possessing a certain degree of opulence: in number from 12 to 23. To pronounce a decision in favour of the demand, 12, but not less than 12, are sufficient. But here the information furnished is put upon the footing, and bears the character and denomination of evidence. Here, then, is a mass of evidence: what next becomes of it? — is it never acted upon? No, never. It is uniformly let drop, and forgotten: all the use made of it, is the enabling this majority, if such be their pleasure, to send the cause to be tried upon evidence not quite so sure of perishing, by a judge or jury in the same manner as an action as above is tried. And this in many cases with needless delay: as also in length various, but in no case so enormous as to be worth mentioning in comparison with that which in the mode of suit called *action* has been seen organized. Now, in this preliminary operation, by which during a course of several days perhaps, from 12 to 23 persons have been occupied in the situation of judges, besides an altogether unlimited number in the character of witnesses, what is the use? Answer: Absolutely none. What is the effect? To enable these 12 or 23 esquires, as they are called, to afford impunity without reproach to every malefactor to whom it suits their purpose to afford this encouragement to crime. Yes: such is the purpose, if not of the creation of the institution, of the preservation of it: and for this purpose it is, if for any purpose at all, that the veil of secresy, by means of the sanction of an oath — that veil which *originally* was thrown over it for other purposes — is preserved over it.

Parties' appearance.—Various are the ways in which the institution, by which parties are exempted from the obligation of appearing face to face in the judicatory, in the presence of the judge and the assembled public, is inimical to the ends of justice, and conducive to the actual ends of judicature.

In the first place comes the pecuniary profit, immediate and direct, to both branches of the fraternity, professional and official.

Encouragement given to the relatively and comparatively opulent, who are able without difficulty to defray the expense as above, to oppress and provoke the relatively and comparatively unopulent: from the provocation in so far as submitted to without retaliation, no self-regarding profit accrues to the lawyer tribe in a pecuniary shape: remains only the gratification to aristocratical sympathy, from the spectacle of a class of men below them, suffering under the yoke imposed upon them by the class to which they of the law-learned class do belong. But every now and then, resentment under oppression gets the better of prudence: then comes retaliation, and from retaliation, litigation, in which the party originally oppressed and injured is made defendant.

Great is the assistance which this plan of depredation receives from the darkness in which the whole system of procedure is involved by the thick cloud of technicalities. No means has any ordinary man of knowing beforehand, what the quantum of expense is, in which before the termination of the suit he has in contemplation, he may be involved.

In a common-law case (in Westminster Hall,) to a question what the expense (on the plaintiff's side suppose) will be, he is informed it may be about thirty pounds, more or less. Nor is the information absolutely untrue, but this amount may be taken as the minimum. Of this minimum, according to circumstances, it may swell out to hundreds or to thousands.

The most remote, but upon the whole (its comprehensiveness considered,) the most productive source of profit, remains still behind. This is the endemial and all-infecting depravity, which it engenders and keeps alive in the community, by withholding the great check, by the application of which it would, in so vast a proportion, be kept from coming into existence. Were he assured of having his misconduct exposed and made public in the presence of a judge and a numerous auditory, as it would be were he under the obligation of meeting his adversary face to face, and

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giving immediate answer to whatever pertinent questions were proposed to him, he would shrink from the exposure. As it is, at the expense of a series of lies, — from the disgrace of which he is eased by a society of lawyers, who are paid for originating and giving utterance to them — he being but the adoptive father (and not understood to be so) of them — he travels on in the road to iniquity — he perseveres in his course of injury without a check: expense is the utmost he has to fear. Thus it is, that the whole judicial system, with everything that belongs to it, is a perpetual hotbed for the raising a perpetual crop of depredation and oppression in every imaginable shape, with proportionable profit to Judge and Co. as often as it breaks out in the shape of litigation.

Such is the state of the disease. Now as to the remedy. A few words will suffice for the prescription of it. Of late years, publicity has received an unexampled extension, under the protection of a beneficent and comparatively wise Ministry,* and reformation of morals in a sensible degree is become the consequence. But in comparison of what it might be, the extent is still extremely narrow. Think what it would be, if in every instance of oppression in cases now called civil cases, the oppressor saw himself under the obligation of facing his victim or intended victim, in presence of a judge and a numerous and promiscuous auditory, and to make true answer (on pain as now of punishment for perjury) to every question which the oppressee, now no longer excluded from the judicatory by the expense of the toll-gate leading to it, might with the consent of the judge find cause to put to him. At present, opulence is to wrong in every shape (so long as individuals alone are regarded as being the objects of it) an effectual licence: in the here-proposed code, the licence will be withdrawn, and in the judicatory now become the arena of justice, the oppressor and the oppressed would meet on nearly equal terms.

In the English courts, the first act continues to be an act of extortion and oppression — of extortion practised on those who have money to pay for the chance of what is called justice.

By any one whose desire it was to do justice to the demand, would a refusal be given to hear what the demandant had to say on the subject? — to hear whether upon the face of his statement there was any ground for the demand — any just and sufficient cause, sufficient to afford a warrant for the vexation and expense?

No: he would hear what the applicant had to say; and, upon so doing, would in many instances do complete justice, or at any rate learn more of the real state of the case, than an English judge — common-law judge and equity judge put together — will (unless the defendant chooses it) at the end of eighteen months.

By this one act, a double injustice is perpetrated: injustice in the shape of extortion and oppression — extortion practised upon the man or the woman who is already injured — oppression on the man or the woman whose liberty is sold to the demandant, without inquiry, at the fixed price — the judge, for the sake of the profit received by himself, lending himself as an instrument to the profit of his accomplices and confederate worshippers in the professional branches of the law.

The judge's immediate profit from the extortion — though several times the amount of that price for a day's labour, which thousands and scores of thousands would be happy to get and cannot — formed at its origin a very considerable proportion of the amount of that income which would suffice for the subsistence of a family during a whole year. In the interval between that time and the present, that price has not been raised in any proportion approaching to that in which the value of money has fallen. But to the multitude of suits (the result of the prodigious increase of wealth — of wealth absolute and relative), what has been lost in the value of such items, has been amply compensated for by what has been gained by the increased number of those same items.

For the facility of giving exercise to oppression in this shape, where oppression is the object, not so much as an account, true or false is received or asked for, at the hands of the purchaser.

Afterwards, indeed, when the proposed defendant, in jail or out of jail, has by more fees made known his intention of appearing in that character, an account is made and received. But this account is made, not by the party himself, but by an attorney, who by the course of the court has been obliged to compose it of a parcel of lies, with only just so much truth in it as serves for a pretence for compelling the exhibition of a similar composition called a *plea;* the parties on both sides, for months or years, are kept thus at a distance from one another by the judge, while at long-protracted and altogether useless intervals, they are compelled to employ the lawyer to carry on the war of words: being composed of a mixture of lies, abuse, and nonsense, with or (as it may happen) without a small particle or two of relevant or irrelevant truth interspersed by accident.

Elicitation of evidence. Natural modes, oral or epistolary in all cases, according to circumstances, in respect of delay, vexation, and expense.

* Written December 1826.

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Technical modes, diversified according to circumstances which make no difference with relation to aptitude or probability as to the correctness and completeness of the evidence elicited.

Unapt sources of diversification:—

1. The power and consequent denomination of the judicatory in which the elicitation is performed; *i. e.* whether a common-law court, or an equity court.

2. The relation borne by the examination to the suit. In a common law-court, no party on either side examined at all: in an equity court, a party on one side alone examined; —to wit, the defendant's side; and be examined in the epistolary mode only. An extraneous witness examined in the oral mode alone; and in this case in the utmost secresy, by the examining judge alone: no interrogative matter for counter-interrogatories, admitted to be given to the parties on both sides, or to a party on either side.

Natural procedure:—Form of litis-contestation, from beginning to end, exceptions excepted, oral. Exceptions are—1. Impossibility by reason of local distance; 2. Preponderant evil, in the shape of delay, vexation, and expense.

Technical procedure:—In equity practice, scriptitive, or say epistolary. Sole case in which oral discourse is received, that in which the examinee is either an extraneous witness, or a party litigant examined in the character of an extraneous witness.

Of the two effectually distinct functions, the requisitive and the probative, the exercise is mixed up in the same document—to wit, the bill.

The pursuer states the service he requires, alleges supposed facts, for the purpose of forming an efficient cause of right or title to the service demanded, or say required, at the hands of the defendant, and eventually at the hands of the judge, and exercises the evidence-elicitative function at the charge of the defendant. The evidence delivered, is what is called the *charging part* of the bill, containing in it, of necessity, a large portion of false and mendacious statement: the judicatory refusing all relief to every person who will not add to his requisition, a tissue of false and mendacious statements, known so to be by the judge.

In the common-law practice, the litis-contestation is called *pleading;* and that which is productive of delay, vexation, and expense in a special degree, *special pleading.*

Equity practice, to its own peculiar mode, adds incidentally the common-law mode. This is the case as often as, either instead of, or in conjunction with, what is called his *answer*, the defendant's lawyer delivers in, what is called a plea, or what is called a demurrer.

If and in so far as justice—that is to say, giving execution and effect to the correspondent portion of the substantive branch of the law—is the end in view, no part of the matter found in any of the books, under the head of pleading, or special pleading, will have any place in a procedure code having that same for its end in view: no portion is there of it, that is not completely useless. For the purpose of giving execution and effect to that same branch of law, or any part of it, no more information will be to be had from it than from the Koran.

Of the evidence, the judge commonly takes abridged memorandums; of the argumentation, none. Of these abridged minutes, in general no use is made; they are waste-paper, and as such dealt with. For the moment, they serve to assist his recollection when giving his charge to the jury.

The sole case in which any use is made of them, is when application is made to another judicatory, without a jury, for a new trial, by and with another jury. In this case these minutes are conveyed, somehow or other, from the first judicatory to the second: the argumentation not.

In this case, instead of an appeal from the inferior judicatory to a superior, on the ground of the evidence and the argumentation delivered to the inferior judicatory,—is substituted an inquiry grounded on mutilated minutes, for the correctness and completeness of which, nobody is responsible,—for the purpose of a determination, whether evidence from the same source shall be elicited by another such inferior judicatory—no use whatever being made either of the argumentation or the evidence elicited by the inferior judicatory thus tortuously and awkwardly appealed from.

If to make good your claim, it happens to you to have need of your adversary's confessional evidence, you cannot have it without a suit in a judicatory called a court of equity: nor, in that judicatory, to any the most simple question can you make sure of an answer from him in so short a time as a year—to a question to which, if put to him by you in the presence of a judge, as in a small-debt court called a court of conscience, a single moment would suffice you for extracting from him an answer, and that an adequate one.

Think of a nation in which a man at the head of the law, will have the assurance to assert on all occasions, that justice was and is the object of this system.

Special pleading is a system of operations, by which, instead of the conjunct appearance of the parties in the first instance before the judge, making their respective allegations subject to responsibility compensational and punitional in case of falsehood, they are kept at a distance from the judge's chamber, for the purpose of causing to be delivered, at in-

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tervals of weeks or months, their several allegations, in the form of ready written discourses penned by their respective professional assistants, and without responsibility in any shape in case of falsehood. Special pleading is here utterly excluded. What is it? Answer: From beginning to end, a perfect nuisance; created and preserved in the teeth of the most obvious and recognised principles of justice.

In case of mendacity, or temerity of assertion, there will be responsibility, compensational and punitional: of evidence, the elicitation performed *vivâ voce*, by and in the presence of the judge. Throughout the whole course of the elicitation, questions to be put arising out of the answers. This is the course pursued wherever the obtainment of a correct, clear, and all-comprehensive conception of the appropriate facts belonging to the case, is really an object of desire. Under the actual system, the same individual in the character of a party, is constantly exempted from that responsibility to which that same individual would, in the character of a witness, be as constantly subjected. To what end, but that, under favour of this licence (coupled with the exclusion from the eye and the ear of the judge, and the scrutiny of cross-interrogations, with the aid of questions arising immediately out of the answers,) he may be not merely invited but forced to that course of false assertion, with factitious delay for months or years, out of which profit to the amount of hundreds or thousands of pounds is by this system of mendacity, fraud, and deception, extracted.

The system and course of procedure has for its professed object two things: — 1. The obtaining a well-grounded assurance respecting the facts alleged on both sides; 2. The ascertaining the bearing of the law upon the facts, the existence of which is, on the ground of the several allegations, believed by the judge. Now then, as to the ascertainment of the facts. If this course were really conducive to the professed end in any one case, so would it be in every other: if in any one sort of judicatory, so would it be in every other. Conceive it now transported into the bosom of every family—into every committee of inquiry in the House of Commons—into the judicatory of every justice of the peace, and every sessions of justices of the peace. Suppose this course of inquiry, and no other, employed — But in vain should we tax our imagination in carrying it higher than the bosom of every family: for how many weeks together — for how many days together — upon this footing, could human society continue?

A project was on the carpet for giving to Scotland the benefit of English special pleading. The jury-court, it seems, cannot go on without it. Great indeed must be the embarrassment, thick the confusion, portentous the expense, when the enormity of it is too great even for those whose profit rises in proportion to it. Not much less, perhaps still greater, must be the embarrassment produced by the endeavour to substitute to this deleterious remedy another drawn from the same pharmacopœia. The project is altogether a curious one: by statute law to establish common law. A rather more obvious, more simple, and if justice were the object, a more effectual (or rather the only effectual) one, would be, by statute-law to establish statute-law. The only objection is, that the mode of conducting the business would (if made as it ought to be, and could be, made) be too effectual. To uncognoscibility, it would substitute universal notoriety; to the maximum, the minimum of vexation, delay, expense, and consequently, lawyers' profit.

An oblique and indirect or fictitious way, is the only way in which, *in this mode*, a conception, such as it is, as a *rule of action*, can be grounded upon; the assumption is, that by competent authority a rule of action has been established; and upon this assumption, false to the perfect knowledge of all those who build upon it, is grounded, on each occasion, the power they assume and exercise.

For these fifteen years past, the utter impossibility of accomplishing on this plan, in any tolerable degree, the ends of justice, has stood demonstrated: but not those ends — on the contrary, the ends diametrically opposite to them are on this occasion, as on every other, pursued where the workmen are lawyers, and, by the supineness of the people, suffered to take their own course.

Think of the impudence, as well as the wickedness of these men, so unaptly decorated with the name of judges, sitting with the doors of their judicatories shut against the parties; — the unhappy individuals kept out of sight and speech of each other, and of the judge, even when living both of them next door to the justice-chamber. And to what end? To what, but to fabricate a pretence (how shallow it is, every honest mind must see) for setting (at their expense) their respective lawyers to pelt one another with these masses of absurdity and nonsense.

Books upon books have been written and published, to show how this trash may be manufactured to the greatest advantage. — What a quantity of talent has been thus wasted!

Of this series of altercation, the whole use and purpose is the furnishing a pretence for the exaction of fees from the suitors, for the emolument of the lawyers of all classes and grades. Neither to the number of the instruments by which this course of altercation is carried on, nor to the length of any one of them (nor consequently to the expense of the whole,) are there any certain limits. As little are there to the length of the delay

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thus organized and manufactured: the whole of it being completely useless. Many are the thousands of pounds to which the expense — not small the number of years to which the delay — has thus been known to be swelled.

All this while, not a syllable about the matter does the judge ever deign to know. The fees go some of them to his own immediate use, others to his profit in the shape of patronage, through the hands of his instruments and nominees; and for this remuneration not an atom of service does he perform.

The first and only occasion on which, if at all, any part of this altercation comes within his cognizance, is, when the stock of useless matter thus spun out comes at last to be exhausted, a determination comes to be taken on the subject of the whole together. Even then, not a tenth part of the contents of this lay stall is presented to the eyes or the ears of the judge. By the advocates on each side, those scraps are picked out, which in the hurry of the moment are regarded by them as best suited to their respective purposes, and the remainder is consigned to that neglect to which the whole is so well entitled.

In some cases, the string of altercation terminates in what is called an issue; and in these cases there is a question of fact which finds its way to another judicatory in which a jury is presided over by a judge.

Before me lies a work on the subject of special pleading, intituled "On the Principles of Pleading in Civil Actions."

On looking into this work, one sentiment that presents itself is a sentiment of regret called forth by the idea of the prodigious waste of mental labour and talent there employed, applied to a subject essentially worthless, and destined to disappear as soon as the light of truth shall have shone upon the subject. Raphael, painting his cartoons *al fresco*, upon a frozen pannel, is the image that presents itself.

By this work of his, the author superseded and converted into waste paper all the works of which before him the labour had been applied to this field. His turn it will next be, to be involved in the same fate.

Of no lover of justice can it fail to be the wish and desire to see applied to the furtherance of justice, that talent, which without any imputation on the author has hitherto had no other occupation than the giving facility to the occupation of obtaining emolument, by the giving increase to expense, of which injustice is the real fruit, under the name of justice.

Ask how much written pleadings there should be in a suit! Ask first how much chaff and powdered bones there should be in a quartern loaf!

Except for special and adequate reason, in every case, in every sort of case, for giving execution and effect to the portion of law in question, the course of procedure should be in everything the same: no difference in any one case, compared with any other: much less a difference, at the option of an individual on the pursuer's side.

This feature of natural procedure, compare it with the correspondent one in English technical procedure.

Over a bottle, or without a bottle before them, between a priest of the established religion, and a lawyer, a dispute takes place, and a scuffle ensues. It occurs to the priest to make an instrument of revenge out of this, and to betake himself to the law for vengeance.

The options that lie before him are —

1. Action.
2. Indictment.
3. Information, filed in the ordinary mode, or by leave obtained of the judge.
4. Information *ex officio*, filed by the attorney-general without need of such leave.
5. Libel in the ecclesiastical court, termed also spiritual court.

Suppose an information applied for in the ordinary way, and refused: — the attorney-general after this, would he take upon him to file an information *ex officio*, without leave applied for to the court. Who can say? He may or may not: it depends upon himself. If the assailant be a duke, and the person assaulted a priest, and nothing more, — probably in this case the attorney-general would not: but suppose the assailant a bishop, and the person assaulted, a Church-of-England priest, a Presbyterian layman, or what is worse, a Unitarian priest: very different now is the aspect worn by the case. Lord Northington, or Lord Thurlow either, would have damned them both, and bid them get about their business; but Lord Eldon has no curses — but great doubts.

In every one of these cases, the fact being by the supposition one and the same — not only the mode of proof, and the shape in which the evidence is elicited, is different, but even the source from which the evidence is admitted.

An action the priest or bishop cannot maintain, unless he has testimony other than his own at command: or unless he has the means of affording adequate inducement to some one, to give his evidence to the attorney, that it may be put into the brief by which the instructions are given to the advocate called counsel — through whose lips for this purpose it has to make its way to the ears of the court.

What is it that he asks for? Is it money? Though it be but a farthing, nothing he can say to get it is, even if it be said under the sanction of an oath, fit to be believed: he is accordingly excluded from saying it. Is it

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revenge? Everything he can say for the hope of gratifying the different passions, is credible.

Antecedently to his visit to the grand jury, he may have made a like visit to a justice of the peace, complaining to him of the breach made of the king's peace. Here, then, is another judicatory.

Never yet was exemplified, it may be said, a case thus diversified as the above. Probably not: but if not, it really is not the fault of the law.

Record, in natural procedure —Record, in technical procedure.—The instrument denominated a record — what, if justice were the end in view, would be the contents of it? On the part of the judge, the definitive decree, with an account of the execution and effect given to it; and the operations, as well on the part of the judge as on the part of his subordinates, and the parties and extraneous witnesses (if any) included. In particular, the evidence on which the several operations performed by the judge had been grounded, would be introduced by the demand which had been made by the pursuer, and the passage or passages in the text of the law on which that demand had been grounded. If so it had happened that debate had taken place as to the import of the alleged portion of law, for the applicability of the facts proved on either or both sides, in relation to it, — here would be a question of law; and the interpretation put upon that occasion by the judge upon the law, would form an incidental mass of matter, proper to be entered. But this is a sort of occurrence which, comparatively speaking, would be rare. In a great majority of cases there never has been, even in the most unsettled state of the law (still less will there be under any tolerable improved state of the law,) any discussion respecting the bearing of the law upon the facts. The common run of debts and common assaults are the occurrences by which the correspondent majority of the number of suits will have been produced. The substance of the matter, of which in every case the bulk of the record will be composed, will be the peculiar and characteristic part of the matter (being in each individual case different,) showing the ground on which the decree pronounced in that same individual case was founded. Other miscellaneous matters — such as any delay that had been produced either by the nature of the case, or by reluctance on the part of parties or witnesses, or misconduct on the part of judicial subordinates—will, for one purpose or other, need to be entered upon the record; but they will be merely casual and collateral to the direct purpose of the suit. That which will compose a constant and necessary part of the suit in every case is the matter of the demand itself — the matter of the defence, if any, and the evidence on which the demand and the defence, if any, was grounded. Thus much as to the matter belonging to the record. Now as to the matter, of which under the technical system of procedure in use in English practice, the instrument called a record is composed. Take in the first place the common-law courts — for in the sort of judicatories called equity courts, the contents of the instrument called a record (if indeed in these courts there be any instrument to which that denomination is authoritatively applied), are altogether different; an unrebuttable presumption this against one or the other, and a presumption of no inconsiderable force against both.

But to begin with the common-law courts. How stands the matter with regard to the evidence?—what is done in relation to it? Answer: Absolutely nothing. On this subject, what it presents is, total and constant silence. Of what nature, then, is the matter of which this so regularly framed and carefully preserved document is composed? Answer: With the exception of the decree called here judgment, which in each class of cases is the same, and a demand (which is never expressed in the terms in which it comes from the party whose demand it is,) scarce anything but what is either irrelevant, or to the knowledge of everybody, in every case, false. As to the judge, whose judgment it purports and pretends to be, — never, unless by some extraordinary accident, has it come within his cognizance. It is made for him by a sort of machinery, like the turning of a wheel.

As to the incidental occurrences before alluded to, entry is indeed, for the most part, if not in every instance, made of them: made, but on what instrument? Not on the record, but on this or that book, distinct from it, and not referred to in it. The consequence is, that to almost every purpose, the information afforded by the record, amounts to next to nothing. Not so as to mischievous purposes; for purposes of that description are served by it in abundance: mischief to the parties by the load of needless and useless expense — mischief to the whole community by the veil of obscurity and mystery with which it contributes to cover the whole system.

Of no breach of duty, however numerous such breaches may have been on the part of any of the actors of the judicial drama, does it afford any information: consequently, to no such breach of duty does it afford any check. Not a particle does it contain of evidence; but at the same time, not sparing is the quantity of matter composed of allegations: in these allegations, however, the matter is a medley composed of a mixture, in indistinguishable proportions, of truth and notorious falsehood.

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Nothing do these pleadings (such is the name by which they are distinguished) — nothing do they contain of that matter, on which, under the name of evidence, the decree will have been grounded. What they are composed of, is, inferences, drawn, on both sides, by anticipation from the evidence expected, or pretended to be expected, to be elicited.

A proper record, as has been seen, would be a plain statement of every relevant occurrence that happens to have taken place in the course of a suit.

Sentence. — Special rational causes excepted, the imperative decree, or say the sentence, should be pronounced at the same time with the opinative decree.

As in non-penal, so in penal cases.

Special cause may be — time necessary for inquiry into the circumstances of the parties.

In English practice, when the means of repression is determined by the jury, as it is when compensation alone is awarded, the jury are never allowed a moment between the pronunciation of the opinative and that of the imperative decree: the opinative and imperative are one and the same.

But when the means of repression is determined by the judge, as it is where punishment, under the name of punishment, is awarded, an interval of days, weeks, months, perhaps even years, is made to have place between the pronunciation of the opinative decree by the jury, and the imperative by the judge.*

All this while, the defendant is kept in a state of mental torment: of costs, increase to a considerable amount is unavoidable; and to the quantum of the amount, there are no limits.

This determination, which the unlearned are held capable of coming to, and forced to come to accordingly at once, — is it that the learned judge, after his twenty years' lucubrations, is unqualified for coming to?

No: but the true and only cause of this uncertainty is the profit which it puts into the pockets of the lawyers of both classes, professional and official; and the power — the arbitrary and tyrannical power, which the judges have been suffered thus to place in their own hands.

In natural procedure, no needless concurrence necessitated.

In technical procedure, needless concurrence abundantly necessitated.

Examples of needless concurrence necessitated, are —

1. In non-penal law. In conveyancing: sinecure trusteeships.

Consequence, needless delay, vexation, and expense, in obtaining concurrence at the hands of the original trustees; much more at the hands of their representatives.

2. In procedure. Equity procedure: necessitating the concurrence of a defendant in the transfer made of his property, instead of making the transfer uninterventionally by the authority of the judicatory. Consequence, delay, &c. as above. To evilly-conscious defendants, a premium on non-compliance.

3. In penal procedure, under Rome-bred law: rendering the confession of the defendant necessary to his punishment; and for the obtaining of this confession, applying torture. Consequence, in case of inability to endure the torture, infliction of punishment on the innocent: in case of ability, impunity to the guilty, in respect of ulterior punishment.

Natural procedure. The judge, on issuing a mandate to any person, suitor or non-suitor, requiring him to do or to forbear from doing, in furtherance of justice, a certain act, to particularize beforehand the remedy or remedies, punitional or satisfactional, or both, of which, at the charge of the individual in question, application will be made, in the event of non-compliance with such mandate.

Technical procedure. For the purpose in question, judicial power needlessly employed in causing or endeavouring to cause the individual on whom the obligation is intended to be imposed, to give the appearance of consent by his signature attached to an instrument for that purpose appointed.

The evils attached to this practice are the following: —

1. Delay, vexation, and expense, — partly natural and unavoidable — partly fictitious; resulting from the performance of this needless and useless operation.

2. Needless and useless complication.

No reason is there, why in one case more than in another, consent on the part of a suitor should be necessary to give validity to the exercise appointed by the legislature to be given to the functions of a judge.

Natural Procedure—investigatorial process by means of indicative evidence — needful alike in all cases — employed in all cases..

Technical Procedure — confined to certain particular cases.

Natural. For each subsequent operation, time fixed according to the circumstances of each individual case, from the examination of the party, or his proxy, then present in the judicatory.

Technical. For each sort of operation, one and the same period of time fixed by a general rule. Thence, infinity to one, the time is either more or less than sufficient: if more

* This observation chiefly applies to those criminal cases which are tried in the Court of Queen's Bench, and not to the great mass of felonies and misdemeanors tried in the ordinary criminal courts, where the punishment is usually awarded immediately after the verdict is pronounced. — *Ed.*

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than sufficient, the consequence is needless delay; if less than sufficient, needless expense employed in the endeavour, successful or unsuccessful, to obtain further time; there is also needless delay in this case.

The power of depriving another of his liberty, which the technical system gives to any one who applies for it, and without responsibility on his part, the natural system offers, it is true, to any one, but in no case without the responsibility by eventual punishment to which he is subjected in case of mendacity: so in the same manner is any extraneous party who is called as a witness: to which responsibility, when the case requires it, is added the obligation of finding security, either real, by property of his own, actually pledged by himself, or by a conjunct obligation entered into by a juridical bondman, who binds himself to concur in affording compensation to the defendant, in the event of any abuse of power exercised at his charge.

The female sex, that part of it which is in the married state, are more strongly interested in the establishment of the natural system of procedure, than are persons who belong to the male.

For cruelty on the part of the husband, at the charge of the wife, no relief is so much as professed to be given by any judicatories but those which belong to the ecclesiastical branch. But inadequate as is the remedy thus applicable, so great is the expense of application for a chance of it, as of itself suffices to establish a denial of justice in nineteen out of every twenty cases, not to say of ninety-nine out of every hundred.

The class which, being most exposed to injury in this shape, and as such is most in need of remedy, is the class to which all remedy is denied.

The fundamental principles of natural procedure are, —

1. Publicity maximized.
2. Exclusion of middle-men maximized.
3. Initiatory applications, not epistolary, but oral, maximized.
4. Penal security against falsity universalized, with warning of ditto.
5. No one made defendant, but on determinate and substantial grounds.
6. Epistolary statement receivable, to save delay and vexation, but never definitive; oral interrogation always addible.
7. Mode of procedure for the discovery of the appropriate truth, the same in all cases.
8. Delay, vexation, and expense, minimized in all cases.

The fundamental principles of technical procedure are —

1. Publicity minimized.*
2. Number of middle-men maximized.
3. Initiatory application by party to judge, not admitted.
4. Penal security against falsity, — extent minimized: distance from commencement of suit, maximized.
5. At the pleasure of every plaintiff, any person made defendant, antecedently to the allegation of any grounds determinate or undeterminate.
6. Recently established exception excepted, and that flagrantly inadequate, liberty of any man violated by confinement at the will of any man in the character of plaintiff.
7. Mode of procedure, on pretence of the establishment of truth, different in different cases.
8. Aggregate of delay, vexation, and expense, maximized. Fictitious delay established in an infinity of proportion, according to occasion and pretence.

APPENDIX A.

INITIAL SKETCH OF THE PROCEDURE CODE.

THE procedure code, as well as the judiciary establishment, has for its business the avoidance of the evils opposite to the several ends of justice.

Opposite to the declared ends are — 1. Misdecision. 2. Non-decision in cases which call for decision.

They accordingly have for their common business the providing of the requisite securities against these same evils.

To know and provide those securities, it will be necessary to ascertain the cause of these same evils.

These causes may be distinguished into —

1. Those which are liable to have their origin in the state of the judicial establishment
2. Those which are liable to have their origin in the system of procedure.

Non-decision has for its causes —

1. Non-institution, in cases which require institution.
2. Non-termination, in cases in which institution has taken place.

Causes of non-institution are —

1. Apprehension of partiality to the prejudice of the pursuer's side.
2. Inability to defray the expense.
3. Apprehension of expense, vexation, and delay, to an amount preponderant in value over the chance of success.

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* See Judge Bayley's attempt to shut up police-offices in particular, on the ground that they are *not courts of justice*, *Morn. Chron. Oct.* 31 1824. Or see *Morn. Chron. 2d Nov.* 1824, "Manchester — Reverend Magistrate Hay's Charge to Grand Jury."

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Causes of non-institution having their seat in the judicial establishment: —

1. Insufficiency in the number of the judicatories.

2. Multitude of judges in the same judicatory: apprehension thence, of needless delay on the several occasions for decision.

Causes of non-institution having their seat in the state of the procedure code: —

1. Magnitude of the expense of institution.

2. Apprehension of the magnitude of the expense, where there is much delay, incident to continuance, and preparatory to decision and execution, in favour of the pursuer's demand.

Causes of delay having their seat in the procedure code, with their correspondent securities: —

1. Fixation of time for the several steps.

Correspondent security against delay: exceptions excepted, reception and accersition of parties, witnesses, and evidence-holders in each suit, as soon as the time in the several cases admits: so as not to accerse or prehend any individual earlier than necessary.

2. The not having elicited in the most instructive manner the whole mass of the evidence bearing upon each fact in question.

Correspondent security: giving to each judge the faculty and the obligation of eliciting, in that same most instructive manner, as much as possible of that same mass of evidence, the whole if possible: except in so far as the expense, vexation, and delay, necessary to that effect, shall exceed the advantage gained in respect of superior probability of right decision: instead of assigning to one judge the elicitation of part of the evidence, and to another the elicitation of other parts; or to one and the same judge the elicitation of one part of it in one mode, to wit, a superior mode, and of other parts in another — to wit, an inferior mode.

The advantage, from the giving to one and the same judge who is to decide upon the fact in question, the whole of the evidence as above, the whole of it in the most instructive form, — will be pointed out elsewhere.

Admit at the same time the non-necessity of giving to the ultimately deciding judge the whole of the evidence, in so far as one part relates to one fact in question, another to another not connected with it.

At the same time, where it can be done without preponderant disadvantage in respect of delay, vexation, and expense, of course it will be best on every account, that the ultimately deciding judge should have for the basis of his decision all the several facts in question bearing upon the suit, together with all the masses of evidence respectively bearing upon them.

State now the wanton departures from this rule on the part of the English-bred and Rome-bred systems of procedure; with the causes of these aberrations — to wit, the inaptitude of the authors of the system, in respect of moral and intellectual aptitude: principally moral; they deriving to themselves a sinister advantage from the aberrations.

English-bred law. Aberrations.

I. Divers judicatories, employing each of them a different mode of procedure in this respect: whereas the course of procedure best adapted to the purpose of extracting the truth of the case — the most instructive mass of evidence in relation to the several facts, — is in every individual case one and the same, exceptions excepted.

Examples: —

1. Proceedings in case of an action in King's Bench, Common Pleas, or Exchequer.

2. Proceedings in case of an indictment in King's Bench.

3. Proceedings in case of an information in King's Bench.

4. Proceedings in case of an indictment in the Old Bailey, or on the circuit, in the court of Oyer and Terminer, or the General sessions of the peace.

5. Proceedings in the Rome-bred ecclesiastical and admiralty courts in a penal case.

6. Proceedings in the Rome-bred ecclesiastical and admiralty courts in a civil case.

II. In one and the same judicatory, proceeding in different courses in this respect, and accordingly giving to the suit in those several cases different denominations.

Examples: —

1. In the King's Bench, proceeding by action, indictment, and information: over and above the cases in which the judicatory exercises a controul over other judicatories.

2. In the Exchequer, proceedings by action, and by bill in equity.

III. In a suit, on the occasion of one and the same individual demand, transferring the suit from one judicatory to another in all cases indiscriminately, and without any reason derived from the particular circumstances of the individual case.

Examples: —

1. In an action, causing the suit to be commenced in the King's Bench at Westminster, and from thence carried to the court of Nisi Prius, either in Westminster or in London, at the sittings in or after term, or in some country town, at the court of assize, sitting no more than twice a-year for a few days in each town.

2. So on an indictment or information.

On the above occasions, at the commencement of the suit, in some instances proceeding without evidence: in others, with incomplete evidence on behalf of one side of the suit: in others, with incomplete evidence on the other side of the suit.

Examples: —

1. On an action proceeding without evi-

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dence: allowing the pursuer to harass the defendant, and keep him in hot water for half a year, without having made any ground for his demand.

2. On an indictment, at the commencement eliciting evidence on the pursuer's side only: that evidence not perfectly elicited, and when elicited, not made any use of, on the occasion of the ultimate decision: made use of no otherwise than to the purpose of determining whether the suit shall go on, and evidence be elicited in a perfect manner, at Nisi Prius, half a year afterwards.

3. On the occasion of an information, commencing the suit by evidence, but by evidence elicited in the most uninstructive mode, and that evidence wasted by not being employed in forming the ground for the ultimate decision.

4. On the occasion of a bill in equity, eliciting evidence only on behalf of one side of the suit, to wit, the pursuer's, and that only the defendant's disserving evidence, the allegations of the pursuer not being admitted as evidence, but being knowingly and purposely allowed and required to be false: the elicitation of the evidence of extraneous witnesses being postponed to an indefinitely distant period, and then elicited in no other than a mode eminently uninstructive.

In the establishment of these arrangements, immorality has soared to such a pitch of impudence, as will be matter of astonishment to any future age, in which these abuses, and the others connected with them, shall have received a remedy.

In the case of an action at common law, subjecting any man, at the pleasure of every other man, to the torment of litigation for an indefinite length of time — for years together, if such be the tormentor's pleasure, without requiring any ground whatsoever.

In the case of a bill in equity, not only not requiring on the part of the pursuer any ground whatever, in the shape of true evidence, but admitting and even forcing him, on pain of miscarriage, to launch out into a string of false allegations, which being notoriously false, are not, and cannot be employed in the character of evidence.

Order of elicitation, as between evidence-holder and evidence-holder: —

No fixed order can be otherwise than mischievous. What order will be most convenient it is impossible to know, otherwise than from the particular circumstances of each individual case.

Rules and circumstances on which the choice depends: —

1. Of the evidence of two evidence-holders, A and B: if the evidence of A, and the effect of it, can be understood without reference to the evidence of B; while the evidence of B cannot be understood without reference to the evidence of A, let the evidence of A be first elicited.

If while neither can be understood without the other, or each may be understood without the other, while, in consequence of distance or ill health, one of them can be elicited before the other, let that one be first elicited, which, as above, is capable of being first elicited.

The first evidence capable of being elicited will of course be that of the applicant. But after that, it is impossible to decide correctly by any general rule, whether the evidence of the proposed defendant, if there be but one, or the joint demand or the evidence of a co-interessee of the applicant, will be to be heard to most advantage.

In regard to a defendant, all you can say in favour of his priority, as between him and a co-interessee of the applicant, is, that a decision should not be given to his prejudice, without his having an opportunity of being heard.

But this applies not without exception, to any but penal cases. For in civil cases, to a considerable extent, decisions affecting a defendant's interest will always require to be given in cases in which, by reason of distance or other causes, he cannot have been heard: only, in these cases the decision should be provisional, being liable to amendment in his favour, in the event of his showing sufficient cause.

In the English system, one circumstance that contributes to keep out of sight the demand for an indefinitely variable order of elicitation, is the vast distance between the time of the delivery of the demand, and the earliest time at which any ultimately employable evidence can be received; to wit, the half-year between the completion of the chain of pleadings, and (in country causes) the time of the circuit. So vast is this time, that in most cases all parties on both sides have time to prepare and produce their evidences. But though, in perhaps 99 instances out of 100, this time is some dozen or some hundred times more than sufficient, cases there will always be, in which it is not so much as sufficient. In these cases, application will be made for further time: and if the case be, that the defendant is in the wrong, and his mind in a state of evil-consciousness, here is another half-year at least gained to him for the enjoyment of the fruits of his iniquity, — to take advantage of his own wrong, — while the lawyers of both classes, official and professional, are made sharers in his sinister profit, by the price at which they concur respectively in the selling to him this undue advantage.

Waste of evidence coupled mostly with the elicitation of evidence in an unapt shape: —

1. Testimonial evidence elicited in its best shape, is elicited by *vivâ voce* reception and

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undiquâque interrogation, accompanied *pari passu* with minutation, followed by recordation.

2. Elicited in its next best shape, it is elicited by scriptitive reception and *undiquâque* interrogation, in the same manner, backed by the assurance of the witnesses being upon occasion subjected to interrogation as to the same points *vivâ voce*.

Evidence in its best shape is not yet at its maximum of aptitude, unless subjected to amendment upon occasion — not only to re-elicitation in that same best shape, but to elicitation in the scriptitious shape.

Of course, no such supplemental evidence ought to be elicited without mandate from the judge, with or without previous opportunity afforded of opposition.

When evidence is wasted, the waste is the less to be regretted, when, being taken in an utterly unapt shape, or a less apt shape where it might have been taken in a perfectly apt shape, the shape it is taken in, is one in which it ought not to have been taken.

1. In the grand-jury hearing, antecedently to trial on indictment, what evidence is taken, is taken in the secret mode, without opportunity of counter-interrogation, or counter-evidence.

2. On the occasion of the equity mode of elicitation by bill, concluding with interrogatories, although, so far as regards the interrogatories, the shape is not inapt, yet being necessarily introduced by a tissue of notoriously mendacious assertions, it is in so far elicited in a supremely unapt shape.

In the affidavit shape, it is elicited subject to counter-evidence in the same bad shape, but not subject to counter-interrogation in any shape: much less subject to subsequential and emendatory *undiquâque* interrogation, in the oral shape. In this case, the shape in which it is received is one, in which it ought not on any occasion to be received.

In some sorts of suits, it is received in no other than this bad shape, and forms the sole groundwork which the ultimate decision can ever have. These are —

1. In civil cases, in all the judicatories, all contestation relative to incidental demands, made on the occasion of a suit, except that in which the ultimate decision, called the trial, has place.

2. On an information, it has place on the occasion of the preparatory inquiry, whether evidence elicited in the only good shape shall be received.

Here it is elicited altogether in waste: the more expensive mode of inquiry, by evidence in this its worst shape, being employed antecedently to the eventual employment of evidence in relation to the same facts, elicited in the best shape.

On the occasion of the preparatory examination by a justice of peace, in a case of felony, the evidence is in the first place taken in the best shape; but the whole of what on that occasion is taken in that best shape, is taken in waste, not being suffered to be employed on the occasion of the ultimate inquiry called the *trial*.*

On every account, the sinister interest of the judges is engaged in preserving the custom of taking the evidence in its worst shape: nor is it exposed to doubt, that it is by that same sinister interest, that the custom of taking it in those bad shapes was produced.

1. The interest of the purse. This interest they have given themselves by the price which immediately, or through the medium of their official subordinates and professional connexions, they have established themselves in the habit of exacting, by allowance from, and in partnership with, the government, which on those same occasions has given itself the advantage of the sale and denial of justice.

2. The interest of the pillow. In the best shape—the oral shape—the judges have the long and laborious occupation of superintending, and occasionally assisting, the elicitation of the testimony of the witnesses: that testimony is frequently drawn into tedious length, by inaptitude in all its shapes on the part of the witnesses; to wit, moral, intellectual, judicial, and appropriate relevant talent.

In its worst shape — the affidavit shape — it is presented to them through a channel the most agreeable to them of any in which it is possible to be presented: their old friends and associates impregnated with the same sinister interest and the same stock of ideas, acting in a sphere which is subordinate to their own, and by which their style of address is kept constantly in a strain of reverential homage.

APPENDIX B.

ACCOUNT-TAKING JUDICATORIES.

THERE is a certain species of cases, which will naturally appear to create a demand for a particular sort of judicatory, acting by a particular set of rules. These are the cases of which, in common practice, cognizance has been given to a special judicatory, distinguishable from the ordinary ones by the name of an *account-taking* judicatory.

By an account-taking judicatory, understand a sort of judicatory which has no other

* By a recent statute (6 & 7 W. IV. c. 114) a prisoner is entitled to have a copy of the evidence so taken before the justice; and to have it read at the trial. The judge always has this evidence before him; although, except in a very few cases, it can only be used by him as a guide in the examination of the witnesses.—*Ed.*

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employment than the settling the balance, or say difference, due as between one party and another, in consequence of money or money's worth, disposed of at divers times, by each, at the desire or otherwise for the benefit of the other.

Of the common characteristics of these cases, the principal one, and that an essential one, is this: on the occasion of the inquiry carried on between the parties, opposition of interests has place, but not, unless by accident, actual contestation.

From this principal characteristic arises another, which accordingly may be termed a derivative one: the evidence on which the decision is grounded consists mainly of a piece of written evidence, the trustworthiness of which has not for its assurance the customary securities of counter-interrogation, or, by means of the ceremony called an oath, punishment in case of falsehood: a *voucher* is, in English practice, the name given to a piece of evidence to which this effect is given.

Of a judicatory of this sort, the ordinary occupation consists accordingly in the reception given by the judge to the vouchers presented by or on behalf of one of the parties. On one side of the account stand the articles which the party admits that he has received; of which reception, no other proof, it is manifest, need be required: on the other, the articles which he alleges he has delivered, or caused to be delivered; and of the several acts of the delivery, or assemblages of acts of delivery, the several vouchers are exhibited as conclusive evidence.

But ere an account can be settled in a manner conformable to justice, decision on the subject of divers collateral demands may incidentally require to be delivered: each such demand being of a nature to be contested, and thereby constituted the matter of a distinguishably-separate suit. Of these demands, examples are as follows: —

1. Application for the disallowance of a voucher, on the ground of its alleged unauthenticity.

2. Allegation of a fraud, in respect of the non-performance or mal-performance of some service, the due performance of which is attributed by the voucher.

3. Application for liberty to exhibit evidence of the performance of some service, of which it is alleged by one party that it was rendered by him to the other, but that no voucher for it was received; or that, an appropriate voucher for it having been received, was by some accident lost: in any of which cases, either the value of the service will of course be lost to the applicant, or in proof of its having been performed, such other evidence as the case happens to afford must be exhibited and received.

An account brought before a judge, to be settled by him between the parties, may thus be considered as a congeries of suits, each party in case of contestation being pursuer in respect of the payment of every sum of money, or other service, which he alleges as being due to him: and defendant, in respect of each such service as, being demanded at his hands, he refuses to perform. Here, then, are in this, as in other cases, two parties interested, and a judicatory which on the subject of each such demand is to decide between them.

Certain cases, however, there are, and even to a vast extent, in which on no more than one side is any party seen acting.

On the other hand, considering the variety of the matter above designated, under the name of collateral matter, that would be liable to come under consideration, — no sufficient reason appears, why on this occasion the qualifications requisite on the part of an ordinary judge should be regarded as superfluous.

Still, however, a reason occurs, and one which seems a sufficient one for committing this species of matter to a particular species of judicatory: this is, that a judge-depute, whose time was exclusively or principally employed in the judication of business of so narrow a description, could not thereby be in a situation to acquire experience extensive enough for forming the qualification of a judge at large.

On this and other accounts, a competent person would scarcely be willing to accept, for this business, a pecuniary remuneration so small as what would content him in the other case.

Business of this sort being an object of general dislike, a judge-principal would not be able to obtain deputes in sufficient numbers, on any other terms than, in the case of each individual, an engagement not to employ him on this business.

On all these accounts, the most eligible arrangement seems to be, the committing the location of functionaries for this purpose to the justice-minister at once, or that that minister should locate an audit judge-principal, and he locate deputes in such number as he should find sufficient.

APPENDIX C.

BRITISH INDIA—JURY SYSTEM.

DEAR SIR,—In consequence of the good countenance shown last session in both Houses, when the subject of juries was incidentally brought forward, Mr. Wynn appears to have set himself to work at something — I could not exactly discover what. But there is much virtue in a beginning, and as I know Mr. Wynn to have been seeking information on the subject from the very best authority he could resort to — Sir A. Johnstone — I am

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full of hopes, trusting as I do, that you will keep your eye on the thing in the House, so that the Indian minister may be encouraged as well as watched.

I would indeed it were possible to send out *Sir A. Johnstone* to India, to introduce native juries there, as he so well effected it in Ceylon — for I confess I have many fears for the result of the experiment on account of the unfriendly hands to which it must necessarily be entrusted. What judge from Scotland to Bengal, "Usque Auroram ad Gangem," ever *cordially* loved to divide his power with a jury? But in this case, we have not to contend with that proclivity alone, or in its simplest form. The king's judges in the royal courts at the three great cities (Calcutta, Madras, and Bombay), will probably not much like having to consult with juries henceforth in *civil (quasi-criminal)* cases, in making assessment of damages — or where the parties desire a jury-verdict in preference to a bench-verdict. But the king's judges have never been accustomed to act in *criminal* matters without juries, and they will rather feel favourable than otherwise to the admission of natives and half-castes.

The danger I fear is from the Company's servants, who will have the sole conduct of the experiment in the *provincial* courts, by far the most important part of it, inasmuch as *there* it is wholly new to the people as to the judges; and is in fact a politic and scarcely perceptible beginning — of teaching our subjects to take a share in self-government, and of giving them an interest in the support of our foreign regime. To this I have no sort of doubt the Company and their servants will bear no good-will: it is not in the nature of things they should, if we consider who *they* are, and how chosen, that represent the Company in England — and who *they* are, and how brought up, as a separate caste from early youth, that compose the servants abroad, and are the monopolisers of all office and power there: — rising from the bottom to the top of a list of placemen, all aspiring to hoard and bring away all they can; bound to India by no sympathies — no permanency — no root in the land.

In the infancy of the meditated native juries, everything will depend upon the *provincial judges*. But where shall we look for a liberal philanthropic mind like Sir A. Johnstone, anxious that the thing should work well; careful in selecting — in instructing — in discreetly leading the inexperienced and ill-qualified jurors in the early stages of the institution? The native officers of our Sepoys have all risen from the ranks — are all taken from the *humble* classes of society — *métayers*, *dairymen*, and *soldiers' children*; but they have a plain and simple code of laws to deal with (not simpler than *might easily be compiled* for all ordinary issues, civil or criminal, fit for our proposed juries;) and they are instructed discreetly in the law, and have the evidence expounded by a European judge-advocate in general courts-martial — and by a European officer of their regiment completely skilled in minor courts. In consequence, though the entire administration of military law has been left in the hands of these native juries, as they may be called, even in the most ticklish times, they *are scarcely ever known to do wrong*. This has prevailed for sixty or seventy years! From the same classes, or better classes of society, the *civil* jurors may be taken; and the thing, if not loaded with absurd and revolting oaths too much, may be converted into a mark of distinction. But all this depends on the Company's servants! The European officers of the Sepoys are also Company's servants: but mark the difference of position as to *checks*. The European judge-advocate is selected for his talents out of a mass of candidates, all quick to discern his faults, and aspire to his shoes, if he neglect his duty. The court in which he and his native jurors sit is an *open tribunal* — white and black auditors frequent it. The native officers are commissioned — they must be treated as gentlemen; not bullied or put down with contempt. The proceedings are all recorded (saving the opinions of individuals, which are strictly *secret;*) they must go up to a division commanding officer, who may be of the king's service, — to the judge-advocate to report on — to the commander-in-chief (who is always a king's officer,) and therefore of a different corps from the original European judge. Finally, they *may* be handed up to government, and are published invariably in general orders, with the comments of the commander on them, to every regiment. But what checks are provided for the conduct of a Company's civil servant? What shall efficiently controul exaction and tyranny, if he be capable of such? What shall keep down his ill-will to the jury system? his jealousy of the partial eclipse which his autocracy in the province must suffer? his habitual insolence of office? the white man's — the rich man's — the civil servant's feelings, towards the black — the poor — the "low" man? Nothing but the feeble, formal, "regular channel" controul of official superiors, distant many degrees of latitude, or longitude perhaps — and all belonging to the same corps with the supposed offender. There is no vicinage of his equals — no community to stand in awe of, no one independent of his direct authority or indirect influence! Yes: the tribunals are open — open to the poverty-blasted, ignorant, timid black man, who ventures to wage such a war with the great man of his district: — "open" — but with every stage

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loaded with costs, stamps, and law-taxation, greater in proportion to the extreme indigence of our well-ground eastern subjects, than those of England, — and more remote, more inaccessible, than even our courts.

If no better checks than all this be provided, the attempt to put natives on juries will utterly fail. I know of but one Company's judge in India to whom *I* would commit such a charge with full confidence, *****. But he is of the "liberal faction," and not in favour with his brethren. What, then, is to be done to prevent this excellently meant measure from miscarrying? There is but one efficacious remedy, and to that must we come at last in India as at home — publicity! Shame and intimidation are its offspring, and bodies or classes of men, I fear, in all countries, must be governed by these, and by nothing else so effectually. None are so powerfully and beneficially acted on by "publicity" and its consequences, as judges—to none is it more happily applicable. It is not the mere opening the doors of a court, at which few attend, and fewer still can interpose on the spot to resist abuse: it is the reporting of those present, to those absent — by those who have quick ears and ready memories or glib pens — to those at a distance, who are capable of appreciating and judging, and acting, if need be. The press—the free and anonymous comments of the press, can alone do this, and terrify evildoers. Let its abuse be subject to all the severity of your libel laws; superadd thereon, the six-act penalty of *deportation*, if you will: but let the penalties be inflicted after trial, with or even without a jury, so it be done judicially—done after hearing and determining in public; and not vindictively, privately, summarily, and by the executive power — by the fellow-servants of the offended functionary.

The press, to do any good in a country like India, must be *anonymous* — 1*st*, Because who will dare openly to "bell the cat," in a country where the fortunes of every man depend on the nostril breath of the despots and their servants, to whom England has delivered over India, lease-bound hand and foot. *Secondly*, Because there would be a violation of decorum in a servant criticising his master, an inferior his superior's misdeeds, which is entirely saved by the anonymousness of the criticism: separating effectually the question of "*who writes*," from that of "*what is written?*" Now at this unhappy moment in India, a man may not *report* in the newspapers the *verbatim* completed proceedings of a court of justice: still less make any *comments* on what passes. Very recently, Mr. ****, the editor of a Bombay newspaper, has been transported at a few days notice to England *(via China)* — ruined, in short, for reporting what he offered to prove, by multitudes of witnesses on oath, to be a literal and true report of what passed in court. *He was not allowed to do this*, but was required by Governor **** and his council, at the instigation of the King's judges — **** and **** — to admit that what he had published was *false*, or to be ruined. He was accordingly transported, the judges not choosing to exert their power, *in their own court*, of raising the question of contempt. Such are the facts: they speak for themselves.

If such be the system approved of at home, and to be acted on abroad, of what avail can it be to make judicial reforms of any sort? but, in particular, what rational hope can there be of effecting so great a change as that of admitting the natives of India to take any *real* share in the administration of justice among themselves? But we shall be told, if the press be set free to touch on judicial matters, who shall restrain it in *politics*, or hinder it from becoming the vehicle of safe complaint against oppression? As to the latter, what honest man or honest government, considering itself the equal protector of *all* its subjects, would *wish* to shut up *any* avenue by which the complaints of the weak and the wronged may possibly reach its ear, or at least intimidate the wrongdoer? But in respect to political discussion through the press, this very *Governor* himself has admitted, as you may see in the Oriental Herald, that there is not a shadow of danger in respect to the *natives*. And most true it is, that not one in a million is capable of comprehending the most common discussions on politics, though able enough to understand the use of publishing their complaints aloud. It is for the sake of keeping down the Europeans and half-castes, and of keeping up the arbitrary system of the Company, and gratifying the haughtiness and official insolence of the privileged caste, that the authorities in Leadenhall-street and in India, to a man, oppose anything like freedom of opinion. They feel, perhaps, that the Company could not long stand against the force of public opinion, and are acting in natural self-defence.

Are you aware, that in India there are no *institutions*, no *bodies*, no *corporations*, — no *two men*, in short, who have a right to lay their heads together, and petition the government, using the plural *we?* A single individual may no doubt "bell the cat," if he please, but all meetings are as strictly forbidden, as the use of types or expurgated books is prohibited even to Europeans! In the old slave colonies of England, or the United States, where the state of society is so fearfully delicate, there are no *laws* against the press generally: but woe to the printer or editor who should use his, to excite the slaves to revolt, or even run hard against the vitiated feelings of the slave-owning majority! If he did not starve for want of congenial

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readers, woe to him if he should come before an infuriated jury of overseers and slave-attorneys, on an easily trumped-up indictment for seditious libel! Can we not, then, in India, a handful as we are of whites, trust sufficiently to the "esprit de corps," and the sense of common safety, to deter an Editor (if want of subscribers could not cool the Quixote) from exciting revolt, and persuading the native to cut his own and his fellow Europeans' throats?

But I shall not further pursue this branch of the argument: my object is mainly to show, that without a press, without institutions, without rights of person or property, without the privilege of using freely their skill, industry, and capital, without safe and organized means of complaint or petition,— Europeans, who in India are as yet the only considerable class capable of estimating and influencing the conduct of public men, are powerless and helpless; and that the introduction of jury-trial, or any other improvement that depends materially on the conduct of those who are to set the machine in motion, to be other than a mockery and waste of time, must be accompanied by some *safe* and easy means of *embodying* public opinion *on the spot*, where alone it can have that force in reacting on the judges, of which delay and distance so effectually deprive the injured when it has to travel hither.

1825. * * * * *

To Jeremy Bentham, Esq.

From the Right Honourable Sir Alexander Johnston,

TO THE

Right Honourable Charles W. Williams Wynn, President of the Board of Controul.

26th May 1825.

DEAR SIR, — I have the pleasure, at your request, to give you an account of the plan I have adopted, while Chief-Justice and First Member of His Majesty's Council in Ceylon, for introducing trial by jury into that island, and for extending the right of sitting upon juries to every half-caste native, as well as to every other native of the country, to whatever caste or religious persuasion he might belong. I shall explain to you the reasons which induced me to propose this plan, the mode in which it was carried into effect, and the consequences with which its adoption has been attended. The complaints against the former system for administering justice in Ceylon were, that it was dilatory, expensive, and unpopular. The defects of that system arose from the little value which the natives of the country attached to a character for veracity, — from the total want of interest which they manifested for a system, in the administration of which they themselves had no share, — from the difficulty which European judges, who were not only judges of law, but also judges of fact, experienced in ascertaining the degree of credit which they ought to give to native testimony, — and, finally, from the delay in the proceedings of the court, which were productive of great inconvenience to the witnesses who attended the sessions, and great expense to the government which defrayed their costs. The obvious way of remedying these evils in the system of administering justice, was —*first*, To give the natives a direct interest in that system, by imparting to them a considerable share in its administration; *secondly*, To give them a proper value for a character for veracity, by making such a character the condition upon which they were to look for respect from their countrymen, and that from which they were to hope for promotion in the service of their government; *thirdly*, To make the natives themselves, who from their knowledge of their countrymen can decide at once upon the degree of credit which ought to be given to native testimony, judges of fact, and thereby shorten the duration of trials, relieve witnesses from a protracted attendance on the courts, and materially diminish the expense of the government. The introduction of trial by jury into Ceylon, and the extension of the right of sitting upon juries to every native of the island, under certain modifications, seemed to me the most advisable method of attaining these objects. Having consulted the chief priests of the Budhoo religion, in as far as the Chingalese in the southern part of the island — and the Brahmins of Ramiseram, Madura, and Jafua, in as far as the Hindoos of the northern parts of the island were concerned, — I submitted my plan for the introduction of trial by jury into Ceylon to the governor and council of that island. Sir T. Maitland, the then governor of the island, and the other members or the council, thinking the adoption of my plan an object of great importance to the prosperity of the island, and fearing lest objections might be urged against it in England, from the novelty of the measure — (no such rights as those which I proposed to grant to the natives of Ceylon ever having been granted to any native of India) — sent me officially, as first member of the council, to England, with full authority to urge in the strongest manner the adoption of the measure, under such modifications as his Majesty's Ministers might on my representations deem expedient. After the question had been maturely considered in England, a charter passed the Great Seal, extending the right of sitting upon juries, in criminal cases, to every native of Ceylon, in the manner in which I had proposed; and on my return to Ceylon

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with this charter in November 1811, its provisions were immediately carried into effect by me. In order to enable you to form some idea of the manner in which the jury-trial is introduced amongst the natives and half-castes of Ceylon, I shall explain to you—*first*, What qualifies a native of Ceylon to be a juryman;

2*dly*, How the jurymen are summoned at each session;

3*dly*, How they are chosen at each trial; and,

4*thly*, How they receive the evidence and deliver their verdict.

Every native of Ceylon, provided he be a freeman, has attained the age of 21, and is a permanent resident in the island, is qualified to sit on juries. The fiscal, or sheriff of the province, as soon as a criminal session is fixed for his province, summons a considerable number of jurymen of each caste, taking particular care that no juryman is summoned out of his turn, or so as to interfere with any agricultural or manufacturing pursuits in which he may be occupied, or with any religious ceremony at which his caste may require his attendance. On the first day of the session, the names of all the jurymen who are summoned are called over, and the jurymen, as well as all the magistrates and police-officers, attend in court, and hear the charge delivered by the judge. The prisoners are then arraigned; every prisoner has a right to be tried by thirteen jurymen of his own caste, unless some reason why the prisoner should not be tried by jurymen of his own caste can be urged, to the satisfaction of the court, by the advocate-fiscal (who in Ceylon holds an office very nearly similar to that held in Scotland by the Lord Advocate;) or unless the prisoner himself, from believing people of his own caste to be prejudiced against him, should apply to be tried either by thirteen jurymen of another caste, or by a jury composed of half-castes or Europeans. As soon as it is decided of what caste the jury is to be composed, the registrar of the court puts into an urn, which stands in a conspicuous part of the court, a very considerable number of the names of jurymen of that class out of which the jury is to be formed: he continues to draw the names out of the urn, the prisoner having a right to object to five peremptorily, and to any number for cause, until he has drawn the names of thirteen jurymen who have not been objected to. Those thirteen jurymen are then sworn, according to the forms of their respective religions, to decide upon the case according to the evidence, and without partiality. The advocate-fiscal then opens the case for the prosecution (through an interpreter if necessary) to the jury, and proceeds to call all the witnesses for the prosecution, whose evidence is taken down (through an interpreter if necessary, in the hearing of the jury,) by the judge; the jury having a right to examine, and the prisoner to cross-examine, any of the above witnesses. When the case for the prosecution is closed, the prisoner states what he has to urge in his defence, and calls his witnesses; the jury having a right to examine, and the prosecutors to cross-examine them, their evidence being taken down by the judge. The prosecutor is seldom or ever, unless in very particular cases, allowed to reply, or call any witnesses in reply. The case for the prosecution and for the prisoner being closed, the judge (through an interpreter when necessary) recapitulates the evidence to the jury from his notes, adding such observations as may occur to him on the occasion. The jury, after deliberating upon the case, either in the jury-box, or if they wish to retire, in a room close to the court, deliver their verdict through their foreman in open court; that verdict being the opinion of the majority of them. The most scrupulous care is taken that the jury never separate, nor communicate with any person whatever, from the moment they are sworn, till their verdict is delivered as aforesaid, and has been publicly recorded by the registrar. The number of native jurymen of every caste in Ceylon is so great, and a knowledge beforehand what persons are to compose a jury in any particular case, is so uncertain, that it is almost impossible for any person, whatever may be his influence in the country, either to bias or to corrupt a jury. The great number of jurymen that are returned by the fiscal or sheriff to serve at each sessions—the impartial manner in which the names of the jurymen are drawn—the right which the prisoner and prosecutor may exercise of objecting to each jurymen as his name is drawn—the strictness which is observed by the court in preventing all communication between the jurymen when they are once sworn, and every other person, till they have delivered their verdict, give great weight to their decision. The native jurymen being now judges of fact, and the European judges only judges of law, one European judge only is now necessary, where formerly, when they were judges both of law and fact, two, or sometimes three, were necessary. The native jurymen, from knowing the different degrees of weight which may safely be given to the testimony of their countrymen, decide upon questions of fact with so much more promptitude than Europeans could do, that since the introduction of trial by jury no trial lasts above a day, and no session above a week or ten days at farthest; whereas, before the introduction of trial by jury, a single trial used sometimes to last six weeks or two months, and a single session not unfrequently for three months. All the natives who attend the courts as jurymen obtain so much information during their attendance, relative to the modes of proceeding and the rules of evidence,

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that since the establishment of jury-trial, government have been enabled to find among the half-caste and native jurymen, some of the most efficient and respectable native magistrates in the country, who, under the controul of the supreme court, at little or no expense to government, administer justice in inferior cases to the native inhabitants. The introduction of the trial by native juries, — at the same time that it has increased the efficiency and dispatch of the court, and has relieved both prisoners and witnesses from the hardships which they incurred from the protracted delay of the criminal sessions, — has, independent of the savings it enabled the Ceylon government to make immediately on its introduction, since afforded that government an opportunity of carrying into effect, in the judicial department of the island, a plan for a permanent saving of ten thousand pounds a-year, as appears by my report, quoted in page 8 of the printed collection of papers herewith sent.* No man whose character for honesty or veracity is impeached, can be enrolled on the list of jurymen. The circumstance of a man's name being upon the jury-roll is a proof of his being a man of unexceptionable character, and is that to which he appeals, in case his character be attacked in a court of justice, or in case he solicits his government for promotion in their service. As the rolls of jurymen are revised by the supreme court at every session, they operate as a most powerful engine towards making the people of the country more attentive than they used to be, in their adherence to truth: the right of sitting upon juries has given the natives of Ceylon a value for character which they never felt before, and has raised in a very remarkable manner the standard of their moral feelings. All the natives of Ceylon who are enrolled as jurymen, conceive themselves to be as much a part, as the European judges themselves are, of the government of their country; and therefore feel, since they have possessed the right of sitting upon juries, an interest which they never felt before in upholding the British government of Ceylon.

The beneficial consequence of this feeling is strongly exemplified in the difference between the conduct which the native inhabitants of the British settlements in Ceylon observed in the Kandian war of 1803, and that which they observed in the Kandian war of 1816. In the war between the British and Kandian governments in 1803, which was before the introduction of trial by jury, the native inhabitants of the British settlements were for the most part in a state of rebellion: in the war between the same governments in 1816, which was five years after the introduction of trial by jury, the inhabitants of the British settlements, so far from showing the smallest symptom of dissatisfaction, took, during the very heat of the war, the opportunity of my return to England to express their gratitude through me to the British government, for the very valuable right of sitting upon juries, which had been conferred upon them by his present Majesty, as appears by the addresses contained from page 16 to page 50 in the printed papers herewith sent. The charge delivered by my successor, the present chief-justice of the island, in 1820, contains the strongest additional testimony which could be afforded of the beneficial effects which were experienced by the British government from the introduction of trial by jury amongst the natives of the island. See that charge in pages 289 and 290 of vol. x. of the Asiatic Journal. As every native juryman, whatever his caste or religion may be, or in whatever part of the country he may reside, appears before the supreme court once at least every two years, and as the judge who presides, delivers a charge at the opening of each session to all the jurymen who are in attendance on the court, a useful opportunity is afforded to the natives of the country, by the introduction of trial by jury, not only of participating themselves in the administration of justice, but also of hearing any observations which the judges in delivering their charges may think proper to make to them, with respect to any subject which is connected either with the administration of justice, or with the state of society or morals, in any part of the country. The difference between the conduct which was observed by all the proprietors of slaves in Ceylon in 1806, which was before the introduction of trial by jury, and that which was observed by them in 1816, which was five years after the introduction of trial by jury, is a strong proof of the change which may be brought about in public opinion, by the judges availing themselves of the opportunity which their charging the jury on the first day of session affords them, of circulating among the natives of the country such opinions as may promote the welfare of any particular class of society. As the right of every proprietor of slaves to continue to hold slaves in Ceylon, was guaranteed to him by the capitulation under which the Dutch possessions had been surrendered to the British arms in 1798, the British government of Ceylon conceived, that however desirable the measure might be, they had not a right to abolish slavery in Ceylon by any legislative act; a proposition was however made on the part of government by me, to the proprietors of slaves in 1806, before trial by jury was introduced, urging them to adopt some plan of their own accord, for the

* This alludes to the documents and evidence given before a select committee of the House of Commons, which was appointed, about sixteen years ago, to inquire, amongst other matters, into the judicial institutions in India. — *Ed.*

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gradual abolition of slavery. This proposition they at that time unanimously rejected. The right of sitting upon juries was granted to the inhabitants of Ceylon in 1811: from that period, I availed myself of the opportunities which were afforded to me, when I delivered my charge at the commencement of each session to the jurymen (most of whom were considerable proprietors of slaves,) of informing them of what was doing in England upon the subject of the abolition of slavery, and of pointing out to them the difficulties which they themselves must frequently experience in executing with impartiality their duties as jurymen, in all cases in which slaves were concerned. A change of opinion upon the subject of slavery was gradually perceptible amongst them; and in the year 1816, the proprietors of slaves, of all castes and religious persuasions in Ceylon, sent me their unanimous resolutions, to be publicly recorded in court, declaring *free* all children born of their slaves after the 12th August 1816, which in the course of a very few years must put an end to the state of slavery, which had subsisted in Ceylon for more than three centuries.

I have the honour to be,

Dear Sir, yours very faithfully,

(Signed) ALEXR. JOHNSTON.

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THE

RATIONALE OF REWARD.

BY

JEREMY BENTHAM.

(ORIGINALLY PRINTED IN 1825.)

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ADVERTISEMENT BY THE EDITOR.

THE history of the present Work is somewhat curious: it is extracted from two sets of manuscripts, differing considerably as to their arrangement; the one in French, and the other in English, written by Mr. Bentham between forty and fifty years ago; and which do not appear to have been ever confronted together.

Both these manuscripts, with Mr. Bentham's papers on Punishment, were, at the desire of M. Dumont, placed in his hands, and, together with some few additions from his own elegant pen, form the matter of the work published by him (at Paris in 1811) under the title of *Théorie des Peines et des Récompenses.* Of this work three editions have been printed in France, and one in England: the "Rationale of Reward" occupies the second volume.

In preparing it for its appearance before the English public, the Editor has taken the above volume as the groundwork of his labours; but having availed himself wherever he could of the original manuscripts, *his* will, in many instances, not be found a literal translation of M. Dumont's work.

The additions made by M. Dumont are marked out, where distinguishable, by appropriate indications. One of these additions being at variance with Mr. Bentham's *present* opinions, has given rise to the remarks which immediately follow.

EDITOR *of Original Edition.*

REMARKS BY MR. BENTHAM.

"Catherine's Scale of Ranks:"—"Bentham or Dumont, on Pensions of Retreat?"—which you please.—You ask my present thoughts:—I am all obedience. Allow me only to name the place. Not in your work, but let it be in a sequel I am preparing for it. From that which you have so kindly made yours, those wicked thoughts would scare away readers, whom, if content with what you give them from my first friend, that sequel may have a chance for. In that production may be seen, not in description only, but *in terminis*, the arrangements, which, after from forty to fifty years for reflection, exhibit the practical —I do not say the *now practicable*—result of the principles of yours: and *that* cleared (forgive my saying so) of what now shows itself to me as dross. Nor yet will it draw readers from yours;—for in yours alone will be found discussions, explanations, and reasonings at length; in the new one (except where the opposite officially avowed principles are examined) little else than results.

Official Aptitude Maximized; Expense Minimized. In these words you have the title of a plan of official economy and education that gives denomination to the whole, and an indication of the matter of the first and principal part. Send your readers, if you have any, to that work. There, with official economy, and official education, they may see national growing out of it—added, and *that* without need of additional description or expense. There, confronted with Radical, they may see Whig and Tory economy, and take their choice. I say Whig and Tory; for these two are one.

As to Catherine and her ranks, they rank not quite so high with me now as then. Pensions of retreat would be invited to make their retreat from your pages, were it not for my respect for editors and readers. In my own work may be seen a picture of them, painted in those colours which now appear to me their proper ones.

"Revise?" Impossible: not to speak of my doing you more harm than good. In the French alone, the "Pensions of Retreat" have already cost me—I had almost said lost me—more days than I can endure to think of: I who have so few left, and work enough left for a hundred times the number. What I have found possible, I have done,—looking over the titles of the chapters and sections (still in the French alone) and, in relation to them, submitting what appears to me an appropriate wording, together with some little alterations and additions which presented themselves to me as amendments.

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THE

RATIONALE OF REWARD.

PRELIMINARY OBSERVATIONS.

THE greatest happiness of the greatest number ought to be the object of every legislator: for accomplishing his purposes respecting this object, he possesses two instruments — Punishment and Reward. The theories of these two forces divide between them, although in unequal shares, the whole field of legislation.

The subject of the present work is Reward; and not reward alone, but every other use which can be made of that matter of which rewards may be formed.*

In the following work, the different sources from which rewards may be derived are examined; the choice which ought to be made between the different modifications of which reward is susceptible, is pointed out; and rules are laid down for the production of the greatest effect with the least portion of this precious matter.

On the one hand, indication is given of the venom, more or less concealed, which is included in the employments which have too commonly been made of it; and an attempt has been made to take away from others certain imputations which the enthusiasm of virtue has cast upon them.

The limits have been traced between the fields of reward and punishment; the springs of that mechanism developed, whence those laws arise to which the power is attributed of executing themselves, and directions given for that combination of remedies, the sweet with the bitter, whereby so happy a union is produced between interest and duty.

The advantages of a system of remuneratory procedure are pointed out; an idea given of the course it ought to take; and an enumeration made of the uses of the matter of reward which are not remuneratory.

The nature and effects of salaries and other official emoluments are inquired into; the nature and degree of the encouragement proper to be afforded to the arts and sciences is discussed; and, finally, the question, — How far it is possible beneficially to apply artificial reward to the encouragement of production and trade, is considered.†

* Everything which can be given in the shape of reward may be called *matter of reward.* This abstract term is necessary, since in many cases, without being reward, this matter may be employed for the same purposes as reward; whilst there are other cases in which it ought to be employed for other purposes.

† In this edition, the portion of matter which constituted Book IV. has been detached, and will be printed, with additions from the MS., as a "Manual of Political Economy."

BOOK I.—OF REWARDS IN GENERAL.

CHAPTER I.

DEFINITIONS.

REWARD, in the most general and extensive sense ever given to the word, may be defined to be — a portion of the matter of good,* which, in consideration of some service supposed or expected to be done, is bestowed on some one, in the intent that he may be benefited thereby.†

When employed under the direction of the principle of utility, it operates as a motive

* *A portion of the matter of good,* and not a portion of good itself. The cause must be distinguished from the effect; — the means of obtaining pleasures or exemptions from pains, from the pleasures or exemptions from the pains themselves. It is the former alone which the legislator has to bestow.

† Or, since Reward, in a certain sense, is

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for the performance of actions useful to society, in the same manner as, under the same guidance, punishment operates in the prevention of actions to which we ascribe an injurious tendency.

The services, in the production of which this precious matter may be employed, may be distinguished into *ordinary* and *extraordinary*.

Ordinary services may be subdivided into regularly recurring or routine, and occasional. By *routine services*, I mean those which, in all the various departments of government, the public functionaries are bound to perform in virtue of their respective offices.

By *occasional services*, I mean those required by the government at the hands of persons not in its employ. They belong almost entirely to the administration of justice, and that branch of the police which is connected with it — as denouncing and prosecuting criminals, giving judicial evidence, and seizing persons accused, &c. To the same head may be referred services rendered to individuals in case of fires, inundations, and shipwrecks: inasmuch as the government is interested in the preservation of every individual in the community, these services may be considered as rendered to it.

To the head of *extraordinary services*, may be referred — 1. Services rendered to the whole community by new inventions, giving to the operations of government, in any of its different branches, an increased degree of perfection: such as important improvements in military or naval tactics, fortification or shipbuilding, &c.; in the mode of administering justice, regulating the police, or the finances, or in any other part of the field of legislation.

2. Services rendered in time of war, by the seizure or destruction of objects contributing to the power of the enemy, or by the preservation of such as belong to one's own country.

3. Services rendered by persons exercising the office of foreign ministers, consisting in the prevention or termination of the calamities of war, or in the bringing about useful alliances.

4. Discoveries of great importance to the augmentation of the national wealth; new methods of abridging labour; the introduction of new branches of industry, &c.

5. Discoveries in science, which are not susceptible of immediate application to the arts.

6. Noble actions, and distinguished instances of virtue: in considering which, not only the immediate benefit should be regarded, but their influence as examples upon the cultivation of similar excellencies.

Such is the field of services: such, therefore, is the field of reward.

With regard to rewards, the most important division is into *occasional* and *permanent*. The first are applied, according to times and circumstances, to a single individual, or to a number of individuals, in virtue of some insulated and specific service. The others are charged upon some general fund provided for an indefinite number of persons, and for a succession of services.

In consequence of the extent and permanence of their effects, it is principally with regard to the latter class of rewards that it will be found of importance to establish the true principles which ought to regulate their distribution. Occasional rewards being confined within narrower limits, and their effects more transitory, erroneous views respecting them are comparatively of trifling consequence.

The most extensive use of the matter of reward takes place in transactions between individuals. In the case of personal services which are performed in virtue of a contract, the pay given to him by whom they are rendered, is his reward. In buying and selling, the reciprocal delivery is the reward for the mutual transfer. But the public, that is to say, the government on account of the public, has a demand for a variety of services and goods exactly similar to those of which an individual stands in need: and it is thus that the most advantageous mode of employing the matter of reward, even in the ordinary course of business, enters into the sphere of politics, and claims the attention of the legislator.

CHAPTER II.

MATTER OF REWARD — SOURCES.

BETWEEN the four objects — delinquency, punishment, expenditure, and reward, there is an intimate connexion. He who knows thoroughly the nature and possible modifications of any one, knows thoroughly the nature and possible modifications of all the rest. Why so? Because they are all of them but so many modifications of good and evil — of the instruments or causes of pain and pleasure, considered in a particular point of view. Whatever mischief being produced contrary to the will of the legislator, takes the name of an offence, the same when produced in pursuance of that will (so it be with a direct intention on his part that the party shall be a sufferer by it) takes the name

among the number of those names of fictitious entities which cannot be expounded but by paraphrasis, it may be said, that — Reward is given to a man, when, in consideration of some service supposed or expected to be rendered by him, a service, which it is intended should be a service, is done to him.

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of punishment. Reward is to good, what punishment is to evil: reward on one part supposes expenditure on the other: whatever is received by one party on the footing of reward, is expended by some other: — when a view, then, is given of the several possible modifications of offence, a view is at the same time given in reality, if not in name, of the several possible modifications of reward.

This may at first sight appear a paradox; but as the absence of good is comparatively an evil, so the absence of evil is comparatively a good: the notion, therefore, of evil, and of all sorts of evil, is included in the notion of reward.

The several modifications of the matter of reward may be comprised under four heads: — 1. The matter of wealth; 2. Honour; 3. Power; 4. Exemptions. In respect of the employment of the direct mode for affording pleasure, it belongs not properly to political,* but to domestic government or education.

1. *The matter of wealth.—Money*, or *money's worth*, is by much the most common stuff of which rewards are made; and in general the most suitable of which they can be made: why it is so will appear hereafter.

2. *Honour.* — Honour may be made out of any stuff. In some cases, it is produced by the bearing a particular title not hereditary, — as the name of the office a man holds. In other cases, it is hereditary, and places the individuals bearing it in a distinct rank, superior to that of the other classes, — as in the case of the nobility. In other cases, it is unaccompanied with any distinguishing denomination, or any particular title, — as in the case of medals, or public thanks conferred after any great victory, in the name of the king and parliament.

A graduated scale of ranks, especially when its gradations are determined by merit, and depend upon actual service, is an excellent institution. It creates a new source of happiness, by means of a tax upon honour, almost imperceptible to those by whom it is paid: it augments the sum of human enjoyment; it increases the power of government, by clothing its authority with benignity; it opens new sources for the exercise of hope, the most precious of all possessions; and it nourishes emulation, the most powerful of all incentives to virtuous actions.

Such a graduated scale of ranks has at all times been in use in the military branch of the public service. But in this case, the principal object is not honour, but power: — superiority in rank is invariably accompanied by superiority in command. The honour which accompanies the power is but an accidental appendage.

Catherine II. extended the application of this arrangement to the civil service. She distributed all the public officers in the civil department into distinct and even numerical classes, corresponding with the distribution of rank in the army: — secretaries, judges, physicians, academicians, all the civil functionaries, being advanced by steps, a perpetual state of emulation and of hope stimulated their labours throughout the whole course of their career. It was an invention in politics, which matches the most ingenious discovery in art that the present century has witnessed. At one stroke, without violence or injustice, hereditary nobility was deprived of the greater part of its injurious prerogatives. The foremost in rank and wealth began his career at the lowest step: his ascent through each gradation depending upon the appointment of the sovereign, if without merit, he was left behind, while men of the most obscure birth took precedence of him. This engine was the more powerful, from the gentleness with which it operated — the simple non-collation of reward performing the office of punishment.

Another advantage gained by the transference of the denominations of the military ranks into the civil service is, that the respect borne by the military to the civil functionaries is thus in no small degree increased. It is an ingenious artifice for conquering the barbarous and absurd contempt for civil functions which prevails in all military governments. The assimilation of ranks naturally leads to the assimilation of respect. From the time that this arrangement was made, the nobility were seen eagerly to engage in offices, which before they had regarded with disdain.

Orders of knighthood appear like floating fragments detached from some such regular system of honorary rewards.

In some states, an order of knighthood has been established under the title of "*The Order of Merit.*" It might be supposed that this order had been established as a jest, by way of satire upon all other orders. Not so, however: whatever ridicule there may be, falls exclusively upon those who are members of this order: of all orders it is the least distinguished; the nobility are not candidates for admission — they consider it derogatory to their *birth*. It is the reward of — it may be purchased by, *service*.

The higher ranks of knighthood, are they to be considered as rewards? — are they public rewards? To this question it appears difficult to give a decisive answer. They are

* Whether wisely or not, it is, however, in some countries employed by the government itself. Under the consulate government of France, fêtes were given at the expense of the government in each year, on what were called *les jours complimentaires*. The principal part of expense of the opera at Paris, is said now to be defrayed by the government.

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bestowed for so great a variety of reasons, that to give any description of them, which shall be applicable to all cases, is impossible. They are sometimes given for the performance of distinguished services; but much more generally to courtiers and men of rank, who are the companions of the sovereign, to increase the splendour of his court. In these cases, the merit proved is, that the individual has made himself agreeable to the sovereign. But if persons thus decorated claim distinctions not belonging to other members of the community, — if every one must yield them precedence, ought not some public reason to be given for creating this superiority — for this comparative degradation of the largest portion of the community? Ought such drafts upon the respect of the public to be drawn in favour of an individual, till it has been shown that he has rendered services to entitle him to this special homage? When thus conferred, is not a resource that might yield important fruits employed with bad economy? We shall return to this subject.

3. *Power.*—The principles which ought to regulate the distribution of this great object of human desire, belong to the head of constitutional law, rather than to our present subject. Power is created for a purpose altogether different from that of serving as matter of reward. Merit is not the only consideration by which its distribution must be governed.

Under a monarchical government, for example, the inconveniencies attending the election of a king may be so serious, that the supreme power ought to be attached to some qualification more manifest and indispensable than the personal merit of an individual. In a mixed government, also, in which there is a chief magistrate, and a body of hereditary nobles invested with certain powers, it may be thought proper that this body should be composed of many members: but the more numerous, the less susceptible is it of that sort of selection which supposes in each individual distinguished merit.

Thus far, however, we may determine in general, viz. that power, wherever it can be employed without inconvenience as matter of reward, ought to be so employed.

In thus using it, the difficulty is to select any act or event that shall serve as evidence of the capacity of individuals for exercising the power with which they may come to be invested. In public employments, for example, how various are the talents required, for the possession of which no single act can be considered as satisfactory evidence! Were this not the case, the greater number of public employments might be conferred as rewards for the performance of some determinate service, respectively relating to them.

In the Gazette, notices might be given, couched in the following terms: — "Whoever produces the most perfect die, shall be placed at the head of the Mint." — "Whoever produces a model of the most serviceable piece of artillery, shall be placed at the head of the Ordnance." — "He who constructs the swiftest sailing vessel, united with the most perfect means of attack and defence, shall be placed at the head of the naval architecture." — "The author who writes the best treatise upon commerce, finances, or the art of war, shall be placed at the head of the Board of Trade, shall be first Lord of the Treasury, or Commander-in-Chief, respectively. He who writes the best treatise on the laws, shall be made Chancellor."

At first view, nothing can be more captivating than such a plan; but upon the slightest examination, it will be found more specious than solid. Why? Because it is by no means uncommon for a man who is in an eminent degree endowed with one of the qualities requisite, to be altogether destitute of others equally indispensable.

There are, besides, cases in which even this imperfect mode of proof is altogether wanting. During a long period of tranquillity, by what describable service can a military man display his talents for command? Among the qualities most essential for such a duty, are presence of mind, enlarged views, foresight, activity, courage, perseverance, personal influence, &c. &c. By what specific act can an officer who has seen no service, show himself to be possessed of any of these qualifications? We are reduced, then, to mere conjecture. The best founded opinions are drawn from his habits of life, his attachment to his profession, and above all, the confidence reposed in him by those who are engaged in the same profession, whose opinion is founded upon a multiplicity of acts, which in the aggregate constitute his character.

Discernment, or the art of judging of individual capacity, is a rare quality, whose use it is impossible to supersede by general rules.

A slight advance might perhaps be made in this difficult art, did we possess a catalogue of *the indications of talents or capacity*, as applicable to the various departments of state.*

* For the illustration of the ideas of the author upon this subject, I had prepared a note, in which I had collected together various instances of the prompt display of that subtle and penetrating talent which detects the possession of qualities undiscernible to ordinary eyes. To avoid, however, engaging in too long a discussion, I shall confine myself to a single instance. A person well acquainted with anecdotes relating to the Russian court, gave me, while I was at Petersburgh, the following account of the origin of the success of the High Chancellor Besborodko: — Being still in a subordinate office belonging to the Chancery, one day, when he had presented

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4. *Exemptions.*—The legislator creates two sorts of evils: he appoints punishment for offences; he imposes burthensome duties upon the various members of the community. Hence exemptions may be of two kinds: exemptions from punishment already incurred; exemptions from civil burthens.

An exemption from punishment already incurred, is a pardon. Pardons have often been given in the way of reward, that is, in consideration of former services. Such acts cannot be foreseen and provided for by anticipation: they are the result of the discretion entrusted in this behalf to the sovereign.

Under the English law, however, there are instances in which, by anticipation, exemption from punishment is granted; that is to say, before the punishment is inflicted. Thus, from the policy or weakness of the temporal sovereign, the English clergy obtained in times of barbarism an exemption in all cases from capital and several other kinds of punishment: an exemption which being by statute law confined, in regard to causes on the one hand, while by common law it was extended, with regard to persons on the other, has left this part of the penal branch of the law in the confusion under which it still labours.* †

The nobility followed the example of the clergy. In almost every country of Europe they have found themselves invested with exemptions of this nature. Ancient Rome set the example. No citizen could be put to death: Verres, convicted of the most atrocious crimes, atoned for them by enjoying at a distance from Rome the fruits of his plunder.

When Catherine II., empress of Russia, convened together deputies from all the provinces of that immense empire, under the pretence of their assisting in the formation of a code of laws (a sort of parody of the legislative assemblies of free states, which was not however without its use, in so far as it contributed to the spread of enlightened ideas,) she conferred upon them, amongst other privileges, an exemption from all corporal punishment, cases of high treason excepted. This species of distinction, which as a reward for legislators, could scarcely be imagined in any other state than one just emerging from a state of barbarism, had doubtless for its object the increasing their self importance, and the conferring upon them a sort of rank which should last beyond the duration of their duty.

As a man may be punished in his person, his reputation, his property,—in like manner, through necessity, and not with the view of punishing him, he may be burthened. An exemption from a burthen is an exemption from the obligation of rendering service: services are either services of submission, in the rendering of which the will of the party has no share—or services of behaviour.

Of exemption from services of submission, not exacted in the way of punishment, we shall not find a great variety of examples. In Great Britain, members of the upper house of Parliament and other peers constantly, and members of the lower house at certain periods, are exempted from arrests: this privilege they may be considered as enjoying partly on the ground of satisfaction, partly that they may not be diverted from the exercise of their functions, and partly because, being members of the sovereign body, they would have it so.

Among services performed by action, are some which may be styled services of respect. It is a service of respect exacted by usage in every kingdom in Europe not to wear a hat, or what is equivalent, in the presence of the king. In Spain, some families among the nobility enjoy the privilege of remaining covered in the presence of the king. In Ireland, the head of one family (the family of the De Courcys, earls of Kinsale) enjoys the like exemption, as a reward for some service rendered by an ancestor.

By a British statute, he who apprehends and prosecutes to conviction a criminal of a certain description, received amongst other rewards an exemption from parish offices, together with the privilege of transferring that exemption to another.

By other British statutes, persons who have borne arms for a certain length of time in the service of the state, were exempted from the obligation of those laws which, lest industry should be too common, forbade a man from working for his own benefit at a trade at which he had not worked seven years for the benefit of another.

There are various other exemptions of the same nature: but as the object here is not to give an exhaustive view of these several exemptions, but merely a few instances to serve

various ukases to the Empress (Catherine II.) he perceived that he had forgotten to compose one that he had been particularly commanded to prepare. His first alarm being over, he determined how to act, and pretended to read the ukase in question, though he held in his hand only a sheet of blank paper. The Empress was so well satisfied with the performance, that she desired to sign it immediately. The disconcerted clerk was compelled to acknowledge his neglect. The Empress, less offended with the imposition than struck by the presence of mind which it displayed, forthwith placed him at the head of the department, in which before he had held only a subordinate situation.—*Dumont.*

* In Poland, the poor gentlemen serve as domestics to the wealthy nobility: they perform without scruple all the menial offices that are reckoned by us as most degrading. There was only one thing about which they were solicitous, and which distinguished them from the class of slaves: it was that they should not be beaten except when stretched upon a mattress.

† Benefit of Clergy was abolished by 7 & 8 Geo. IV. c. 28, § 6.—*Ed.*

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by way of example, the above specimens may suffice.

One general observation applies to all cases of exemptions from general obligations imposed by law: it is — that the more severe the laws, the more abundant, as drawn from this source, is the fund of reward. It may be created by a mere act of restitution, by the rendering of justice: to some may be given what ought to be left for all: conditions may be annexed to what ought to be given gratuitously. The greater the mass of injustice inflicted, the greater the opportunity for generosity in detail. The oppressive government of one sovereign is a mine of gold to his successor. In the church, it is the good works of their predecessors — in the state, it is their bad works, that increase the treasure of their successors. In Russia and in Poland, emancipation is a very distinguished reward. A tyrant may reward by doing less mischief.

One word on the last article of reward — *Pleasures*. Punishment may be applied in all shapes to all persons. Pleasure, however, in the hands of the legislator, is not equally manageable: pleasure can be given only by giving the means by which it is purchased — that is to say, the matter of wealth — which every one may employ in his own way.

Among certain barbarous or half-civilized nations, the services of their warriors have been rewarded by the favours of women. Helvetius appears to smile with approbation at this mode of exciting bravery. It was perhaps Montesquieu that led him into this error. In speaking of the Samnites, among whom the young man declared the most worthy selected whomsoever he pleased for his wife, he adds, that this custom was calculated to produce most beneficial effects. Philosophers distinguished for their humanity — both of them good husbands and good fathers, both of them eloquent against slavery, how could they speak in praise of a law which supposes the slavery of the best half of the human species? — how could they have forgotten that favours not preceded by an uncontrouled choice, and which the heart perhaps repelled with disgust, afforded the spectacle rather of the degradation of woman than the rewarding a hero? The warrior, surrounded by palms of honour, could he descend to act the part of a ravisher? And if he disdained this barbarous right, was not his generosity a satire on the law?*

Voltaire relates with great simplicity, that at the first representation of one of his tragedies, the audience, who saw the author in a box with an extremely beautiful young duchess, required that she should give him a kiss, by way of acknowledging the public gratitude. The victim, a partaker in the general enthusiasm, felt apparently no repugnance to make the sacrifice: and, without the intervention of the magistrate, we may trust to the enthusiasm of the sex, and their passion for distinction, for preferences that may animate courage and genius in their career.

* In the Koran, Mahomet permits to his followers to add to the number of their concubines, which otherwise is limited, the captives whom they can take in battle. It was not thus the Scipios and Bayards made use of their victories. Such is the difference between barbarism and civilization.

CHAPTER III.

OF REWARD AND PUNISHMENT COMBINED.

THERE are some cases in which it would be improper to employ either reward or punishment alone. They are those in which the two forces may with advantage be united — in which the legislator says to the citizen, Obey, and you shall receive a certain reward; disobey, and you shall suffer a certain punishment.

The two modes may be properly united when the service required by the law depends for its performance upon a small number of persons, in virtue of the peculiar circumstances in which they happened to be placed. If, for example, the object be the securing a delinquent at the moment that he is about to commit an offence, to inform against him or to prosecute him — it will be found expedient, in order to ensure the rendering of such services, to combine with a reward for their performance, a punishment for their omission.

In such cases, punishment is useful in two ways: beside the effect produced by its own force, it also sustains the value of the reward. There is a very strong prejudice in the public mind against persons who accept pecuniary reward for the performance of such services; but when a penal motive is added, the public resentment is abated, if not altogether removed. The prosecution of a criminal for the sake of the pecuniary benefit derivable from it, is generally regarded as discreditable; but he who undertakes the prosecution to avoid being himself punished, will be considered at least as excusable. The desire of self-preservation is called a natural propensity; that is to say, is regarded with approbation. The desire of gain is a propensity not less natural; but in this case, although more useful, it is not regarded with the same approbation. This is a mischievous prejudice: but it exists, and it is therefore necessary to combat its influence. We must treat opinions as we find them, and not act as though they were what they ought to be. This is not the only instance in which it is necessary to put a constraint upon men's

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inclinations, that they may be at liberty to follow them.

An instance of the judicious mixture of reward and punishment is furnished by the practice pursued in many schools, called *challenging*. All the scholars in the same class having ranged themselves around the master, he who stands at the head of the class begins the exercise: does he make a mistake, the next to him in succession corrects him and takes his place; does the second not perceive the mistake, or is he unable to correct it, the privilege devolves upon the third; and so of the rest; — the possession of the first place entitling the holder to certain flattering marks of distinction.

The two incitements are in this case most carefully combined: punishment for the mistake, loss of rank; reward for the informer, acquisition of that same rank; punishment for not informing, loss of rank the same as for the offence itself.

If, under the ordinary discipline of schools, in the case where the scholar has no natural interest which should induce him to point out the mistakes of his associate, it were attempted to produce these challenges by the force of reward alone, the opinion which the general interest would create would oppose an obstacle to the reception of the reward, most difficult to be overcome: but when the young competitors have to say in their defence, that they have depressed their neighbour merely to avoid being depressed themselves, they are relieved from all pretence for reproach; every one without hesitation abandons himself to the suggestions of his ambition, and, under the sanction of the law, honour combats with unrestrained impetuosity.

This ingenious expedient for exciting emulation is one among the other advantages of a numerous class. In the private plan of education, there are seldom actors in sufficient number for the performance of this comedy.

The most favourable opportunities for legislation are those in which the two methods are so combined, that the punishment immediately follows the omission of the duty, and the reward its performance.

This arrangement presents the idea of absolute perfection. Why? Because to all the force of the punishment is united all the attractiveness and certainty of the reward.

I have said *certainty*: but this requires to be explained. Denounce a punishment for such or such acts: the only individual who cannot fail to know whether or not he has incurred the punishment, is interested in concealing his having incurred it. On the other hand, offer a reward, and the same individual finds himself interested in producing the necessary proofs for establishing his title to it. Thus a variety of causes contribute to the failure of punishment — the artifices of the person interested, the prejudices against informers, the loss or failure of evidence, the fallibility or mistaken humanity of judges — while to the attainment of reward no such obstacles occur: it operates, then, upon all occasions, with the whole of its force and certainty.

Before a celebrated law, which we owe to Mr. Burke, the lords of the treasury were charged, as they still are, with the payment of the salaries of certain of the public servants. Justice required that all should be paid in the same proportion as funds for that purpose were received. But no law was as yet in force to support this principle. As might naturally be expected, all sorts of preferences had place: they paid their friends first, and it cannot be supposed they forgot themselves. When the funds set apart to this service were insufficient, the less favoured class suffered. The delays of payment occasioned continual complaints. How would an ordinary legislator have acted? He would have enacted that every one should be paid in proportion to the receipts; and that his regulations might not be wanting in form, he would have added a direct punishment for its breach, without inquiring if it were easy to be eluded or not. Mr. Burke acted differently: he arranged the different officers in classes; he prepared a table of preference, in which the order is the inverse of the credit which they might be supposed to possess. The noble lords, with the prime minister at their head, bring up the rear, and are prohibited from touching a single shilling of their pay, till the lowest scullion has received every penny of his.

Had he permitted these great officers to pay themselves, and prescribed his table of preference for the rest, under the penalty of losing a part of their salaries, what embarrassment, what difficulties, what delays! — Who would undertake the odious task of informer? How many pretences of justification would they not have had? Who would have dared to attack the ministers? In this arrangement of Mr. Burke, till they have fulfilled their duty, they lose the enjoyment of all their salary; they lose it without inquiry and without embarrassment. Thus rendered conditional, their salary becomes in reality the recompence of their regularity in paying the others.

The advantages of this invention may be thus summed up. Their salary, depending upon the performance of the service, is no longer a barren gratification, but a really productive reward. The motive has all the *force* belonging to punishment: by the suspension of payment, it operates as a fine. It possesses all the *certainty* of a reward: the right to receive follows the completion of the service, without any judicial procedure.

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CHAPTER IV.

OF THE UNION OF INTEREST WITH DUTY, AND OF SELF-EXECUTING LAWS.

WHAT has been said in the preceding chapter will serve to elucidate the meaning of the above two expressions, which, though in familiar use with political writers, have never yet been completely explained.

The legislator should, say they, endeavour to unite interest with duty: this accomplished, they consider perfection as attained. But how is this union to be brought about?—what constitutes it? To create a duty and affix a punishment to the violation of it, is to unite a man's interest with his duty, and even to unite it more strongly than by any prospect of reward. But this is not universally at least what they mean; for if punishment alone were sufficient for the establishment of the desired connexion between interest and duty, what legislator is there who would fail in its accomplishment? — what would there be to boast of in a contrivance which surpasses not the ingenuity of the most clumsy politician?

In this phrase, by the word *interest, pleasure* or *profit* is understood: the idea designed to be expressed is, the existence of such a provision in the law, as that conformity to it shall be productive of certain benefits which will cease of themselves so soon as the law ceases to be observed.

In a word, the union in question is produced whenever such a species of interest can be formed as shall combine the *force* which is peculiar to punishment with the *certainty* which is peculiar to reward.

This connexion between duty and interest is to a high degree attained in the case of pensions and places held during pleasure. Let us suppose, for example, that the continuance of the pension is made to depend upon the holder's paying at all times absolute obedience to the will of his superior. The pensioner ceases to give satisfaction; the pension ceases. There are none of the embarrassments and uncertainties attendant on ordinary procedure; there are no complaints of disobedience made against persons thus circumstanced. It is against the extreme efficacy of this plan, rather than against its weakness, that complaints are heard.

In some countries, by the revenue laws, and particularly in the case of the custom-house duties, it is not uncommon to allow the officers, as a reward, a portion of the goods seized by them in the act of being smuggled. This is the only mode that has appeared effectually to combat the temptations to which they are perpetually exposed. The price which it would be worth while for individuals to offer to the officers for connivance, can scarcely equal, upon an average the advantage they derive from the performance of their duty. So far from there being any apprehension ofth eir being remiss in its discharge, when every instance of neglect is followed by immediate punishment, the danger is, lest they should be led to exceed their duty, and the innocent should be exposed to suspicion and vexation.

The legislator should enact *laws which will execute themselves.* What is to be understood by this? Speaking with precision, no law can execute itself. In a state of insulation, a law is inoperative: to produce its desired effects, it must be supported and enforced by some other law, which, in its turn, requires for its support the assistance of other laws. It is thus that a body of laws forms a group, or rather a circle, in which each is reciprocally supported and supports. When it is said, therefore, that the law executes itself, it is not meant that it can subsist without the assistance of other laws, but that its provisions are so arranged that punishment immediately follows its violation, unaided by any form of procedure; that to one offence, another more easily susceptible of proof, or more severely punished, is substituted.

Mr. Burke's law, which has already been mentioned, is justly entitled to be ranked under this head. The clause which forbids the ministers and treasurers to pay themselves till all other persons have been paid, possesses in effect the properties of a punishment annexed to any retardation of payments — a punishment which commences with the offence, which lasts as long as the offence, which is inflicted without need of procedure; in a word, a punishment, the imposition of which does not require the intervention of any third person.

Before the passing of this law, large arrears on the civil list were allowed to accumulate: their accumulation bore the character merely of a simple act of omission, which could not be classed under any particular head of offence, and the evil of which might moreover be palliated by a thousand pretexts. After the passing of this law, the ministers, it is true, might still, in spite of the law, continue to give to themselves a preference over the other creditors on the civil list — there is no physical force other than existed before to prevent them: but in virtue of this law, any such preference would be a palpable offence—a species of peculation which would be strongly reprobated by public opinion.

Another example is furnished by the laws respecting the payment of stamp-duties.— These laws are represented as among the number of those which execute themselves, and are panegyrized accordingly. This is true with regard to so much of these taxes as is levied upon contracts and law-proceed-

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ings. Let us explain their mechanism. The sanction given to private contracts, and the protection afforded by the law to person and property, are services which the public receives at the hands of the ministers of justice. The method in which these duties, then, are levied, is this: these services are at first refused to all persons without exception; they are then offered to all persons who, at the price set upon them, have the means and inclination to become purchasers. Thus a protection, which might be considered as a debt due from the state to all its subjects, is converted into a reward, by means of the precedent condition annexed to it. This is not the time for examining whether this duty, which palpably amounts to the selling of justice, is a judicious tax: all that is here necessary to be observed is, that the payment is insured by the security it affords, and the danger with which the omission is accompanied.

To range over the whole field of legislation, in order to ascertain the different cases in which this species of political mechanism has been employed, or in which it might be introduced with advantage, does not belong to our present subject: — general directions might easily be framed for the construction of self-executing laws, and their application might occupy a place in "*The recreations of legislation.*"

CHAPTER V.

MATTER OF REWARD — REASONS FOR HUSBANDING.

If it be proper to be frugal in the distribution of punishment, it is no less proper to be so in the distribution of reward. Evil is inflicted in both cases. The difference is, that punishment is an evil to him *to whom* it is applied — reward, to him *at whose expense* it is applied. The matter of reward, and the matter of punishment, spring from the same root. Is money bestowed as a reward? Such money can only arise from taxes, or original revenue — can only be bestowed at the public expense: — truths so obvious, that proof is unnecessary; but which ought on all occasions to be recollected, since, all other circumstances being equal, to pay a tax to a given amount is a greater evil than to receive it is a good.

Rewards, consisting in honour, it is commonly said, cost nothing. This is, however, a mistake. Honours not only enhance the price of services; (as we shall presently see,) they also occasion expenses and burthens which cannot be estimated in money. There is no honour without pre-eminence: if, then, of two persons, for example, who are equal, one profits by being made the higher, the other suffers in at least equal proportion by being made the lower of the two. With regard to honours which confer rank and privileges, there are commonly two sets of persons at whose expense honour is conferred: the persons from amongst whom the new dignitary is taken, and the persons, if any, to whom he is aggregated *by his* elevation. Thus the greater the addition made to the number of peers, the more their importance is diminished — the greater is the defalcation made from the value of their rank.

The case is similar with regard to *power*. It is by taking away *liberty* or *security*, that *power* is conferred; and the share of each man is the less, the greater the number of co-partners in it. The power conferred in any case must be either new or old: if new, it is conferred at the expense of those who are subject to it; if old, at the expense of those by whom it was formerly exercised.

Exemptions given in the way of reward may appear at first sight but little expensive. This may be one reason why they have been so liberally granted by short-sighted sovereigns. It ought however to be recollected, that in the case of public burthens, the exemption of one increases the burthen on the remainder: if it be honourable to be exempted from them, it becomes a disgrace to bear them, and such partial exemptions at length give birth to general discontent.

The exemptions from arrest for debt, enjoyed by members of parliament, are a reward conferred at the expense of their creditors. Exemptions from parish offices and military services are rewards conferred at the expense of those who are exposed to the chance of bearing them. The burthen of exemptions from taxes falls upon those who contribute to the exigencies of the state.

A privilege to carry on, in concurrence with a limited number of other persons, a particular branch of trade, is an exemption from the exclusion which persons in general are laid under with reference to that trade: the favour is shown at the expense of the persons who are sharers in the privilege.

If there be an instance in which any modification of the matter of reward can be conferred without expense, it will be found among those which consist in exemption from punishment. When an exemption of this sort is conferred, the expense of it, if there be any, is borne by those who are interested in the infliction of the punishment; that is, by those in whose favour the law was made, which the punishment was intended to enforce. But if, by the impunity given, the sanction of the laws be weakened, and crimes consequently multiplied, the pardon granted to criminals is dearly paid for by their victims.

The evil of prodigality is not confined to the diminishing the fund of reward: it operates as a law against real merit. If rewards

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are bestowed upon pretended services, such pretended services enter into competition with real services. He succeeds best, who aims, not to entitle himself to the gratitude of the people, but to captivate the goodwill of him at whose disposal the fund of reward is placed. Obsequiousness and courtly vices triumph over virtue and genius. The art of pleasing is elevated at the expense of the art of serving.

What is the consequence? Real services are not performed, or they are purchased at extravagant prices. It is not sufficient that the price paid for them be equal to that of the false services: beyond this, there must be a surplus to compensate the labour which real services require. "If so much is given to one who has done nothing, how much more is due to me, who have borne the heat and the burthen of the day? — if parasites are thus rewarded, how much more is due to my talents and industry?" Such is the language which will naturally be employed, and not without reason, by the man of conscious merit.

It is thus that the amount of the evil is perpetually accumulating. The greater the amount already lavished, the greater the demand for still further prodigality; as in the case of punishment, the more profusely it has been dealt out, the greater oftentimes is the need of employing still more.

When by the display of extraordinary zeal and distinguished talents, a public functionary has rendered great services to his country, —to associate him with the crowd of ordinary subordinates, is to degrade him. He will feel in respect of the fund of reward, in the same manner as the disposer of it ought to have felt. He will consider himself injured, not only when anything is refused to him, but when anything is bestowed upon those who have not deserved it.

A profuse distribution of honours is attended with a double inconvenience: in the first place it deteriorates the stock; and in the next, it is productive of great pecuniary expense. When a peerage, for example, is conferred, it is generally necessary to add to it a pension, under the notion of enabling the bearer to sustain its dignity.

It is thus that the existence of an hereditary nobility tends to increase the price necessary to be paid in the shape of reward. Has a plebeian rendered such services to his country as cannot be passed by with neglect, the first operation is to distinguish him from men of his own rank, by placing him among the nobility. But without fortune, a peerage is a burthen; to make it worth having, it must be accompanied with pecuniary reward: the immediate payment of a large sum would be too burthensome; posterity is therefore made to bear a portion of the burthen.

It is true, posterity ought to pay its share in the price of services of which it reaps a share of the advantage. But the same benefit might be procured at a less expense: if there were no hereditary nobility, personal nobility would answer every purpose. Among the Greeks, a branch from a pine tree, a handful of parsley, — among the Romans, a few laurel leaves, or ears of corn, — were the rewards of heroes.

Fortunate Americans! fortunate on so many accounts, if to possess happiness, it were sufficient to possess everything by which it is constituted, this advantage is still yours! — Preserve it for ever: bestow rewards, erect statues, confer even titles, so that they be personal alone; but never bind the crown of merit upon the brow of sloth.

Such is the language of those passionate admirers of merit who would gladly see a generous emulation burning in all ranks of the community — who consider everything wasted which is not employed in its promotion. Can anything be replied to them? If there can, it can only be by those who, jealous of the public tranquillity as necessary to the enjoyments of luxury, and more alarmed at the folly which knows no restraint than at the selfishness which may be constrained to regulate itself, would have, at any price, a class of persons who may impose tranquillity upon those who can never be taught.

In some states, the strictest frugality is observed in the distribution of rewards: such in general has been the case under republican governments; though it is true, that even in democracies, history furnishes instances of the most extravagant prodigality and corruption. The species of reward bestowed by the people upon their favourites with the least examination, is power — a gift more precious and dangerous than titles of honour or pecuniary rewards. The maxim, *Woe to the grateful nation!* is altogether devoid of meaning, unless it be designed as a warning against this disposition of the people to confer unlimited authority upon those who for a moment obtain their confidence.

After having said thus much in favour of economy, it must not be denied that specious pretences may be urged in justification of a liberal use of rewards.

That portion of the matter of reward which is superfluously employed, it is said, may be considered as the fund of a species of lottery. At a comparatively small expense, a large mass of expectation is created, and prizes are offered which every man may flatter himself with the hope of obtaining. And what are all the other sources of enjoyment, when put in competition with hope? But can such reasons justify the imposition or continuance of taxes with no other view than that of increasing the amount of the

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disposable fund of reward? Certainly not. It would be absurd thus to create a real evil —thus to pillage the multitude of what they have earned by the sweat of their brow, to multiply the enjoyments of the wealthy. In a word, whatever may be thought of this lottery, we must not forget that its prizes must be drawn before we can obtain any useful services. To the individual himself, active is more conducive to his happiness than idle hope: the one developes his talents, the other renders them obtuse; the first is naturally allied to virtue, the second to vice.

In England, reasons, or at least pretexts, have been found for the arbitrary disposal of rewards, which would not exist under an absolute monarchy. The constitution of parliament gives occasion to the performance of services of such a nature as cannot be acknowledged, but which in the eyes of many politicians are not the less necessary. A certain quantity of talent is requisite, it is said, to save the political vessel from being upset by any momentary turbulence or whim of the people. We must possess a set of Mediators interested in maintaining harmony between the heterogeneous particles of our mixed constitution; a species of Drill Serjeants is required for the maintenance of discipline among the undulating and tumultuous multitude. There must be a set of noisy Orators provided for those who are more easily captivated by strength of lungs than by strength of argument; Declaimers for those who are controuled by sentimentalism; and imaginative, facetious, or satirical Orators, for those whose object it is to be amused; Reasoners for the small number, who yield only to reason; artful and enterprising men to scour the country to obtain and calculate the number of votes: there must also be a class of men in good repute at court, who may maintain a good understanding between the head and the members. And all this, they say, must be paid for—whether correctly or not, does not belong to our present discussion.

It may be further said, that the matter of reward, besides being used for reward, may be used as a means of power, — and that in a mixed constitution like ours, it is necessary to maintain a balance among its powers. Certain creations of peers therefore, for example, which could not be justified, if considered as rewards, may be justified as distributions of power. There is at least something in this which deserves examination; but its examination here would be out of place.

Want of economy in the distribution of rewards may also be attempted to be justified, by comparing the sum so expended with the expense incurred in the carrying on of a war. I advise every one who has projects upon the public money, to employ this argument in preference to every other: when one calculates the immense sum expended during a single campaign, either by land or sea; when we reflect on the millions that vanish in sound and smoke, all other profusion sinks into insignificance. When we behold the treasures of a nation flowing away in such rapid torrents, can any great indignation be felt against those who, by art, or obsequiousness, or court favour, detach from the mass a single drop or a small stream for their own benefit? If the people so readily lend themselves to the gratification of political passions —if they part so freely with their gold and their blood, for the momentary gratification of their vengeance or their passion for glory,— can it be expected that they will murmur at the pomp they covet, and the few insignificant favours which their prince bestows? Will they be supposed so mean as to be niggard with pence and lavish with millions?

This mode of comparison is not new to courts: it ought to have been familiar to Louis XIV. if it be true, as there is reason for believing, that the building of Versailles cost two thousand millions of livres. In respect of expense, this was more than equal to a war: but at least it was expended without bloodshed, there was no interruption of trade; on the contrary, it gave vigour to industry, and shed lustre over the arts. What a fortunate source of comparison to the advocates of absolute monarchy!

There is yet another mode of estimating the justness of any public expenditure—another source of comparison somewhat less agreeable to the eyes of courtiers. Compare the amount of the proposed expenditure with an equal portion of the produce of the most vexatious and burthensome tax. In this country, for example, let the comparison be made with the produce of the tax on law proceedings, whose effect is the placing of the great majority of the people in a state of outlawry. The option lies between the abolition of this tax and the proposed employment of its produce. They thus become two rival services. It is a severe test for frivolous expenses, but it is strictly just. How disgraceful does wasteful luxury appear in the budget, when thus put in competition with the good whose place it occupies, or the evil of which it prevents the cure!

From these observations the practical conclusion is, that the matter of reward being all of it costly, none of it ought to be thrown away. This precious matter is like the dew: not a drop of it falls upon the earth which has not previously been drawn up from it. An upright sovereign therefore gives nothing. He buys or he sells. His benevolence consists in economy. Would you praise him for generosity? Praise also the guardian who lavishes among his servants the property of his pupils:

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The most liberal among the Roman Emperors were the most worthless; for example, Caligula, Claudius, Nero, Otho, Vitellius, Commodus, Heliogabalus, and Caracalla: the best, as Augustus, Vespasian, Antoninus, Marcus Aurelius, and Pertinax, were frugal. (*Esprit des Loix*, liv. v. ch. xviii.)

A most important lesson to sovereigns: it warns them not to value themselves upon the virtue of generosity—in short, not to think that in their station generosity is a virtue. If not a strictly logical argument, it is, however, a popular and persuasive induction:—"Esteem not yourselves to be good princes for a quality in which you have been outstripped by the worst."

CHAPTER VI.

REMUNERATION EX POST FACTO.

In the preceding chapter it was stated, that in accordance with the principle of utility, the costly matter of reward ought only to be employed in the production of service; and that, in accordance with that principle, a reward can only consist of a portion of the matter of reward, employed as a *motive* for the production of service. This would seem to exclude everything which can be called liberality—every act by which a reward may be bestowed upon any service to which it has not been promised beforehand.

Such may appear the consequence at first sight. A reward, it may be said, ought only to be bestowed upon the performance of the service to which it has been promised; since it is only where it has been foreseen, that it can have operated as a motive. Why then bestow it upon a service, how useful and important soever, to which it has not been promised? The service you would have been willing to purchase, at the expense of a certain reward, has been happily rendered without any engagement on your part to bear the expense. Why, therefore, should any reward be bestowed? why pretend to employ reward in the production of an effect which has been produced without it? Is not this a useless employment of reward?—is not this an expenditure in pure waste?

Certainly such an expense cannot be justified as a means of producing an effect, which has by the supposition already been produced; but it may be justified as serving to give birth to other effects of a like nature, as likely to cause future services to be rendered, which will agree with those that are past—at least in this, that they are services. A reward which thus follows the service may be styled an *ex post facto*, or unpromised reward. The *Society of Arts* has recognised and employed this distinction. A reward bestowed in fulfilment of a promise, upon the performance of a specified service, is called a *premium*. A reward bestowed without previous promise, is called a *bounty*.

To make it a rule never to grant a reward which has not been promised, is to tie up the hands of true liberality, and to renounce all chance of receiving any new kind of service. There is only one supposition which can justify this parsimony: it is, that every service has been foreseen and endowed beforehand. Whether legislation will ever attain this perfection, I pretend not to know. It has not attained it as yet; and till it be attained, sovereigns may reckon liberality amongst the number of their virtues.

Rewards which in this manner are the fruits of liberality, possess a great advantage over those which are awarded in virtue of a promise. These, confined to one object, operate only upon the individual service specified. The genial influence of the others extends over the whole theatre of meritorious actions. These are useful in determining researches to a particular point; the others present an invitation to extend them to everything which the human mind can grasp. These are like the water which the hand of a gardener directs to a particular flower; the others are like the dew which is distilled over the whole surface of the earth.

A promised reward, bestowed upon one who has not deserved it, is entirely lost. An unpromised reward, thus improperly bestowed, is not necessarily lost. The hand of liberality has been deceived, but the utility of the reward is not altogether thrown away, whilst opportunity is left for a better application of it in future. Had Alexander lavished upon the man who, to obtain his bounty, exhibited his skill in darting grains of millet through the eye of a needle, the rewards he bestowed upon Aristotle, it would have been a proof of prodigality and folly, whose effect would have been to multiply the race of mountebanks and jugglers. In rewarding Aristotle, he, without doubt, rewarded much jargon, of no greater value than this man's sleight of hand in darting millet; but since, in the midst of this jargon, a certain quantity of useful, and at that time new, truth was found, the rewards which this celebrated philosopher received may justly be placed to the account of useful liberality: their tendency was to multiply the precious race of instructors of mankind—the race of philosophers.

In fact, certain acts of liberality, which could not be justified, if considered as promised rewards, may deserve more or less indulgence, may possess a sort of utility of the same kind as that which belongs to rewards not promised. Even the act regarded as service may not strictly deserve to be connected with reward; but the disposition displayed by the distributing hand in awarding a recom-

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pense, may give birth to the expectation of similar rewards for really meritorious service.

Rewards bestowed in pursuance of a promise, may be considered as conferred according to a law belonging to the class of *written laws;* whilst unpromised rewards, though not productive of similar evils, may be considered as establishing a kind of law, or rather tacit rule, analogous to that established by means of punishment, in what is called *unwritten law.* It would be fortunate, indeed, if the penal law might remain unwritten with as little inconvenience as remuneratory law. In the penal, and even the commonly called civil branches, these unwritten laws develope themselves by a train of hardships, not to say of injuries; whilst the worst which can happen in the remuneratory branch of unwritten law is this, that, by reason of its being unknown, it may become a tissue of useless bounty.

Catherine II. did not allow the remuneratory branch of her laws to be exposed even to this danger, from which there is so little to be feared. Had the hand of liberality been expanded — was the dew of reward poured out upon the head of merit — immediately inserted in the Gazette, the notification of the reward connected with the name of the individual, and the service which had deserved it, was resounded throughout the most distant and unfrequented parts of her vast empire. It would have been altogether glorious, had she hastened to give the same character of publicity and certainty to those other branches of unwritten law, in which it is required with so much greater urgency, and had she never conferred favours which she would have blushed to see gazetted.

In England, a noble example of reward, *ex post facto,* was exhibited in connexion with the first establishment of mail-coaches. The manager of a provincial theatre having proposed to the minister this plan for the better conveyance of letters, the plan was received, and having been tried in one part of the kingdom, it was afterwards extended to the whole: and this service being in consequence performed with a celerity and economy of which formerly there was no idea,* — as a reward, the inventor was appointed Comptroller-general of the Post-office, with a salary of £1500 per annum, besides a proportion of the savings. A reward thus judicious and equitable, transports us *to the year* 2440.† It is equivalent to a proclamation to this effect: — "Men of genius and industry, employ your talents for the service of your country; exert yourselves to the utmost; produce your plans; their reception shall depend alone upon the opinion formed of their utility; your country will not grudge the labour necessary for their examination. Good intentions shall not be treated with contempt; you shall not be nicknamed projectors by the idle and the incapable. Your plans shall not be disregarded because of their authors; they shall not be thrown aside because they are extraordinary, provided they be useful. Impartiality shall preside at their examination, and their utility shall be the measure of your reward."

There may appear at first sight a discrepancy between this and the immediately preceding chapter, but it is only in appearance. I say here, no less than heretofore, that the upright dispenser of public treasures gives nothing. He buys or he sells. With promised rewards he purchases bespoken, clearly defined, and limited services; with unpromised rewards he purchases services unbespoken, indeterminate, and infinite. The difficulty in both cases consists in making a proper choice of the action to be rewarded. This choice will form the subject of subsequent consideration.

CHAPTER VII.

PUNITION AND REMUNERATION — THEIR RELATIONS.

Wherefore, throughout the whole field of legislation, cannot reward be substituted for punishment? Is hope a less powerful incentive to action than fear? When a political pharmacopœia has the command of both ingredients, wherefore employ the bitter instead of the sweet?

To these natural but unreflecting inquiries, I reply by a maxim that at first view may appear paradoxical: — "Reward ought never to be employed, when the same effect can be produced by punishment." And, in support of this paradox, I employ another: — "Let the means be penal, and the desired effect may be attained without giving birth to suffering: let the means be remuneratory, and suffering is inevitable."

The oracular style, however, being no longer in fashion, I shall in plain language give the solution of this enigma.

When a punishment is denounced against the breach of a law, if the law be not broken, no one need be punished. When a reward is promised to obedience, if everybody obey the law, everybody ought to be rewarded. A demand for rewards is thus created: and these rewards can only be derived from the labour of the people, and contributions levied upon their property.

In comparing the respective properties of punishment and reward, we shall find that the first is *infinite* in quantity, *powerful* in its operation, and *certain* in its effect, so that it cannot be resisted: that the second is ex-

* See *Principles of Penal Law,* Part III. Chap. XI. Vol. I. p. 556.

† *L'an* 2440, by M. Mercier; a species of Utopian romance, of which the idea was ingenious, but the execution weak.

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tremely *limited* in quantity, oftentimes *weak* in its operation, and at all times *uncertain* in its effect; the desire after it varying exceedingly, according to the character and circumstances of individuals. We may remark again, that the prospect of punishment saddens, whilst that of reward animates the mind; that punishment blunts, while reward sharpens the activity; that punishment diminishes energy, while reward augments it.

It is reward alone, and not punishment, which a man ought to employ, when his object is to procure services, the performance of which may or may not be in the power of those with whom he has to do. This considered, were it necessary to draw a rough line between the provinces of reward and punishment in a few words, we might say, that punishment was peculiarly suited to the production of acts of the negative stamp — reward to the production of acts of the positive stamp. To sit still and do nothing, is in the power of every man at all times: to perform a given service is in many instances in the power of one individual alone, and that only upon one individual occasion. This arrangement of nature suits very well with the unlimited plenitude of the fund of punishment on the one hand, and the limited amplitude of the fund of reward on the other. The negative acts, of which the peace and welfare of mankind require the performance, are incessant and innumerable, and must be exacted at the hands of every man: the positive acts, of which the performance is required, are comparatively few, performable only by certain persons, and by them on certain occasions only. Not to steal, not to murder, not to rob, must be required at all times at the hands of every man: to take the field for the purpose of national defence — to occupy a place in the superior departments of executive or legislative government — are acts which it is neither necessary nor proper to exact at the hands of more than a few, or of them except on particular occasions. To discover a specific remedy for a disease, to analyze a mineral, to invent a method of ascertaining a ship's longitude within a given distance, to determine the quadrature of such or such a curve, — are works which, if done by one man, need never be done again.

It is thus also with regard to such extraordinary services as depend upon accident; such as the giving of information when required, either in the judicial or any other branch of administration. Are you ignorant whether an individual is in possession of the information in question, or if in possession of it, whether he be disposed to communicate it? Punishment would most probably be both inefficacious and unjust as a means of acquiring this knowledge: resort, then, to reward.

In regard to extraordinary services depending upon personal qualification, the impropriety of punishment and the propriety of reward are the greater, when the utility of the service is susceptible of an indeterminate degree of excellence; as is the case with works of literature, of science, and the fine arts. In these cases, reward not only calls forth into exercise talents already existing, but even creates them where they did not exist. It is the property of hope, one of the modifications of joy, to put a man, as the phrase is, into spirits; that is, to increase the rapidity with which the ideas he is conversant about succeed each other, and thus to strengthen his powers of combination and invention, by presenting to him a greater variety of objects. The stronger the hope, so that it have not the effect of drawing the thoughts out of the proper channel, the more rapid the succession of ideas; the more extensive and varied the trains formed by the principle of association, the better fed, as it were, and more vigorous, will be the powers of invention. In this state, the attention is more steady, the imagination more alert, and the individual, elevated by his success, beholds the career of invention displayed before him, and discovers within himself resources of which he had hitherto been ignorant.

On the one hand, let fear be the only motive that prompts a man to exert himself, he will exert himself just so much as he thinks necessary to exempt him from that fear, and no more: but let hope be the motive, he will exert himself to the utmost, especially if he have reason to think that the magnitude of the reward (or what comes to the same thing, the probability of attaining it) will rise in proportion to the success of his exertions.

Such is the nature of extraordinary services, that it is neither practicable nor desirable for them to be performed by a large multitude of persons. If punishment, then, were the means employed to induce men to perform them, it would be necessary to pitch upon some select persons as those on whom to impose the obligation. But of the personal qualifications of individuals, the legislator, as such, can have no knowledge. The case will also be nearly the same, even with the executive magistrate, if the number of the persons under his department be considerable: for antecedently to specific experience in the very line in question, a man's personal qualifications for any such extraordinary task are not to be conjectured *a priori*, but from an intimate acquaintance — such an acquaintance as it is impossible a man should have with a large number. The consequence is, that among any multitude of persons thus taken at random, the greater number would not perform the task, because they would not be able to perform it. But in this case, by the supposition, they must all be punished: here

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there would be a vast mass of punishment laid on in waste, and perhaps the end not compassed after all — a mass of punishment imparting beyond comparison more pain than it would cost to provide a sufficient quantity of rewards.

On the other hand, let reward be employed, and not an atom need be spent in waste; for it may be easily so applied, and it is common so to apply it, that it shall be bestowed in those instances only in which the end is compassed — in those instances in which not only a benefit is attained, but a benefit more than equivalent to the expense. By punishment, a great expense would be incurred, and that for the sake of a faint chance of success; by reward, a small expense is incurred, and that not without a certainty of success.

Again, punishment in these cases would not only be less likely to produce the requisite effect, but would have a tendency to prevent it. How little soever the magistrate might be qualified to collect and to judge of appearances of capacity, for such appearances he would, however, naturally keep some sort of look-out. To exhibit those appearances would therefore be to run a chance of incurring the obligation and the punishment annexed to it. The consequence is obvious: to make sure of not appearing qualified, men would take care not to be so. We are told, that in Siam, when a man has a tree of extraordinary good fruit, it is seized for the king's use. If this be true, we may well imagine that gardening does not make any very extraordinary progress in the neighbourhood of the court of Siam. Nature must do much, for art, we may be certain, will do nothing. We are told upon better authority, of a time when it was the custom to give commissions to officers to look out for the best singers, and press them into the king's service: unless they were well paid at the same time, which would have rendered the alarm occasioned by pressing needless, one would not give much to hear the music of that day.

That selection, which in cases like these is so impracticable in public, is not equally so in domestic life. To parents and other preceptors, it is by no means impracticable to make use of punishment as a motive. They are enabled to use it, because the intimacy of their acquaintance with their pupils in general enables them to give a pretty good guess at what they are able to perform. It may, perhaps, even be necessary to have recourse to this incentive — before the natural love of ease has been got under by habit, and especially before the auxiliary motive of the love of reputation has taken root, and while the tender intellect has not as yet acquired sufficient expansion and firmness to receive and retain the impressions of distant pleasures.

I say perhaps — for it certainly might be practicable to do with much less of this bitter recipe, than in the present state of education is commonly applied. All apparatus contrived on purpose might at least be spared. Towards providing a sufficient stock of incentives for all purposes, a great deal more might be done than is commonly done, in the way of reward alone: by a little ingenuity in the invention, and a little frugality in the application; by establishing a constant connexion between enjoyment and desert; granting little or nothing but what is purchased; and thus transforming into rewards the whole stock of gratification, or at least so much of it as is requisite. If punishment should still be necessary, mere privations seem to afford in all cases a sufficient store. A complete stock of incentives might thus be formed out of enjoyments alone: punishment, by the suspension of such as are habitual: reward, by the application of such as occasionally arise.*

But even when applied by parents and preceptors, punishment, how well soever it may succeed in raising skill to its ordinary level, will never raise it higher: one of the imperfections of punishment remains still insuperable. Accordingly, in the training of young minds to qualify them for the achievement of extraordinary works of genius, the business is best managed, and indeed in a certain degree is commonly managed, by punishments and rewards together; in such sort, that in the earlier part of man's career, and in the earlier stages of the progress of talent, a mixture of punishments and rewards both shall be employed: and that, by degrees, punishment shall be dropt altogether, and the force employed consist of reward alone.

There remains the case in which reward

* See the chapter on Punishments and Rewards in *Practical Education*, by Maria and Lovell Edgeworth — a work which ought to be in the hands of every parent.

No one who takes any interest in the public welfare, can be unacquainted with the plans of education introduced by Mr. Lancaster. Among other contrivances to which his success may be attributed, his system of rewards occupies a conspicuous place. His school-room resembled a toy shop: little carriages, wooden horses, kites, balls, and drums, were suspended by ropes or hung upon the posts, and the walls were ornamented with halfpenny and penny prints. Every candidate for reward, thus had always before his eyes the object of his desire, and he knew the price he must pay for the possession of it. Among so large a number of boys, it has, however, been found necessary to employ severer punishments than such as consist in a mere privation of pleasure. Those selected by Mr. Lancaster depend exclusively upon the dread of shame, and have been made uniformly emblematical or characteristic. Their efficacy far exceeds that of corporal punishment, which children are apt to make it a point of honour to brave, which they habituate themselves to suffer, or which inspires them with a decided aversion for study.

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is proper, because punishment — at least punishment alone — would be unprofitable. By unprofitable, I mean not inefficacious, but uneconomical, unfrugal — the interest of the whole community together being taken into the account, not forgetting that of the particular member on whom the burthen would be to be imposed, and consequently the punishment, in case of non-performance, to be inflicted.

This seems to be the case with all those offices which, standing alone, are *offices of mere burthen*, whether the party favoured be the public at large or any individual or class of individuals: in all cases the labourer is worthy of his hire; and unless it be when every man must labour, no man ought to be made to labour without his hire — the common soldier no more than the general, the common seaman no more than the admiral, the constable no more than the judge.

True it is, that take any man for example, it may with propriety be said, that the public has a right to his services, has a right to command his services, for that the interest of any one man ought to give way to the interest of all. But if this be true as to any one man who happens to be first taken, equally true is it of any other, and so in succession of every man. On the one hand, then, each man is under an obligation to submit to any burthen that shall be proposed; on the other hand, each man has an equal right to see the burthen imposed, not upon himself, but upon some other. If either of these propositions be taken in their full extent, as much may be said in favour of the one of them as of the other. In this case, if there were no middle course to take, things must rest in *statu quo*, the scale of utility must remain in equilibrio, one man's interest weighing neither more nor less than another's; the burthen would be borne by nobody, and the immunity of each would be the destruction of all. But there is a middle course to take, which is, to divide the burthen, and lay it in equal proportion upon every man.

The principle is indisputable: the application of it is not free from difficulties. There are many cases in which the individual burthen cannot be divided: an office, the duties of which it requires but one man to perform, cannot be divided amongst a thousand. But a mass of profit may be formed sufficient to counterbalance the inconvenience which a man would sustain by bearing the office. Let the requisite mass of profit be taken from the general fund, and the burthen is distributed proportionably amongst the different members of the community.*

An expedient sometimes practised in these cases, is, instead of distributing the burthen of the office, to lay it on entire upon some one person, according to lot. This prevents the injustice there would be in laying it upon any one by design: but it does not correct the inequality. The mischiefs of partiality and injustice are obviated; but not so the sufferings of him upon whom the unfortunate lot falls. The principle of utility is in this case only partially followed.

It is one of those instances in which the principle of utility would seem to have given occasion to a wrong conclusion. According to this principle, it is said that the interest of the minority ought to be sacrificed to that of the majority. The conclusion is just, if it were impossible to avoid a sacrifice; palpably false, if it is. But to charge this as a defect upon the principle itself, is as reasonable as it would be to maintain that the art of book-keeping is a mischievous art, because entries may be omitted.

We are now prepared for establishing a comparison between punishment and reward.

1. Punishment is best adapted for restraint or prevention — reward for excitement and production: the one is a bridle, the other, a spur.

2. In every case where very extensive mischief may be produced by a single act, and particularly in the case of such acts as may be performed at any time, punishment is the only restraint to be depended on: such is the case of crimes in general. When the act endeavoured to be produced is in an eminent degree beneficial, it is proper to employ reward alone, or to combine punishment with reward, that the power of the governing motive may be doubled.

3. Considering the abundance of the one, and scarcity of the other, punishment is the only eligible means of regulating the conduct of people in general: reward ought to be reserved for directing the actions of particular individuals. By punishment, mischievous propensities are subdued; by reward, valuable qualifications are improved. Punishment is an instrument for the extirpation of noxious weeds: reward is a hotbed for raising fruit, which would not otherwise be produced.

4. Necessity compels the employment of punishment: reward is a luxury. Discard the first, and society is dissolved: discard the other, and it still continues to subsist, though deprived of a portion of its amenity and elegance.

5. In every case where the service is of such a nature as that no individual possessed

* This supposes the reward to consist in money: if a sufficient reward can be provided out of honour, or power, without money, the burthen of it in the former case is distributed of course among all the members of the community over whom the honour gives precedence; in the latter case it is distributed, according to the nature of the power, among all those who are subjected to that power.

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of the qualifications requisite for its performance can with certainty be selected, the denunciation of punishment would only produce apprehension and misery, and its application be but so much injury inflicted in wanton waste.

In every such case, offer a reward, and it travels forth in quest of hidden or unknown talents: even if it fail in its search, it produces no evil — not an atom of it is lost: it is given only when the service is performed, when the advantage obtained either equals or surpasses the expense.

By the help of these observations, we shall be enabled to appreciate the opinion of those politicians who, after a superficial examination of this subject, condemn legislators in general for the sparing use made of the matter of reward.

The author of *The Wealth of Nations*, who has displayed such extraordinary sagacity in all his researches, has upon this point been led away by mistaken notions of humanity. "*Fear*," says he, "*is in almost all cases a miserable instrument of government*." * It is an instrument which has oftentimes been much perverted from its proper use; but it is a necessary instrument, and the only one applicable to the ordinary purposes of society.

A young king, in the first ardour for improvement, having resolved to purge his kingdom from all crimes, was not satisfied with this alone. His natural gentleness was shocked at the idea of employing punishment. He determined to abolish it altogether, and to effect everything by reward. He began with the crime of theft: but in a short time, all his subjects were entitled to reward; all of them were honest. Every day they were entitled to new rewards; their honesty remained inviolate. A scheme for preventing smuggling was proposed to him. "Wise king," it was said, "for every penny that ought to be paid into your treasury, give two, and the hydra is vanquished." The victory was certain; but he perceived that, like that of Pyrrhus, it would be somewhat costly.

A distinction which exists between domestic and political government may be here worth noticing. No sovereign is so rich as to be able to effect everything by reward: there is no parent who may not. At Sparta, a bit of black bread was the reward of skill. The stock of pleasures and of wants is an inexhaustible fund of reward in the hands of those parents who know how to employ it.

CHAPTER VIII.

REMUNERATION — WHERE HURTFUL.

A REWARD is mischievous when its tendency is to produce offences, or to give birth to noxious dispositions.

* Wealth of Nations, B. V. ch. 16.

To offer a reward to an individual as an inducement to him to commit an act prohibited by law, is to attempt to suborn him: the offence may be called *subornation*. Upon the present occasion, this illegal subornation is not the subject of consideration. The rewards of which we are about to speak, have a corruptive tendency, but do not possess the character of crimes; they are authorized by custom, sanctioned by the laws, and given and received without disguise, without criminal intention: the evil is done with a pure conscience, and often with the public approbation. They are the result of erroneous conceptions, the effects of universal prejudice, or *long-established habit*, which, as Montaigne says, *blunts the acuteness of the judgment*.

The present is one of those extremely delicate topics, in respect of which it may be more prudent to put the reader in the path of truth, and leave him to travel by himself in quest of discoveries, than going through the subject in detail, to wound established opinions, or interfere with individual interests. Without restricting myself to any precise order, I shall therefore exhibit some few examples in which the mischievous tendency is too palpable to admit of denial, and I shall begin with an incontrovertible maxim, which will furnish the criterion of which we are upon the present occasion in search for distinguishing good from evil: —

"Upon all occasions avoid bestowing any-
"thing in the shape of reward, which may
"tend to interfere with the performance of
"duty."

According to this rule, a judge ought not to find himself interested in the prolongation of law proceedings — the minister of state in the promotion of wars — the superintendent in promoting expense — the moral preceptor in setting an example of insinserity — the man of letters in maintaining mischievous prejudices at the expense of truth. The more narrowly we scrutinize into the sources of public evils, the more thoroughly shall we be convinced that they ought to be attributed to the neglect of this fundamental rule.

In support of this maxim, it is not necessary to ascribe to men in general an extraordinary proclivity towards corruption: ordinary prudence and probity are sufficient to enable a man to resist temptations to crimes, or to lead him to abstain from whatever is reputed dishonourable; but it requires somewhat more than ordinary honesty and prudence to be proof against the seductions of an interest that acts with continual energy, and whose temptations are not opposed either by the fear of legal punishment, or the condemnation of public opinion: to yield to such temptations, it is only necessary for him to follow in the beaten track, in which he will be cheered by the presence of a multitude of fellow-travel-

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lers, and encouraged by the example of his superiors. To resist these seductions, he must expose himself to the imputation of singularity — he must proclaim that he is better than others — he must condemn his colleagues and predecessors, and be bold enough to make an exhibition of his probity. Such magnanimity is not altogether unexampled, but we must not reckon upon prodigies. There are even some cases in which, by its secresy, this seductive interest is so much the more mischievous: it operates like a concealed magnet, and produces errors in the moral conduct against which there has been no previous warning. We have said that the legislator ought to endeavour to combine interest with duty; for a still stronger reason ought he to avoid as much as possible everything that yields to the public functionary a certain or a casual, a known or an unknown profit, resulting from the omission or violation of his duties: we now proceed to give a few examples.

In England, the superior judges, beside their ample salaries, which it would be improper to grudge them, receive certain fees which it is impossible not to grudge them; since it is from this source alone that they can generally be considered liable to corruption, and that so much the more easily, since they may be subject to its influence without themselves perceiving it. These fees are multiplied in proportion to the incidents of procedure, the multiplication of which incidents proportionably increases the expense and delay of obtaining justice. In one case, a judge receives nearly £4 for tying, for six months or a year, the hands of justice; and this in one of those cases in which indolence adds her seductions to those of avarice, and the whole is effected in the presence of no other witnesses than such as are urged onward by a still stronger interest to aggravate the abuse.

Another example from among a thousand. Under the Lord Chancellor, there are twelve subordinate judges called *Masters in Chancery*. When an account is to be taken before them, the following is the mode of procedure: The attorneys on the one side and the other ought to appear before the master, either alone, or in company with counsel, as may be convenient. First summons; nobody appears: second summons; nobody appears: at length, third summons; the parties appear, and the matter is put into train. Care, however, has been taken to allow only half an hour or an hour to each set of suitors. The parties are not always punctual: the matter is begun, the clock strikes, and then the matter is dismissed. At the following hearing it is necessary to begin again. All this is matter of etiquette. At each summons, the fees to the judges and the counsel are renewed. All the world must live. Extortion, it is said, is to be banished from the dwellings of finance. At some future day, perhaps, it will not be found a fitting guest for the Temple of Justice — it will be deemed advisable to chase it thence.

In England as elsewhere, it is asked, why lawsuits are eternal? The lawyers say it is owing to the nature of things. Other people say it is the fault of the lawyers. The above two little traits, which are as two grains of sand picked up in the deserts of Arabia, may assist the judgment as to the causes of delay in such procedures.

3. Previously to the year 1782, the emoluments of the paymaster of the army, whose duty as such consisted in signing, or knowing how to sign, his name, were considerably higher in time of war than in time of peace, being principally constituted of a per centage on the money expended in his department. This great officer, however, always found himself a member of parliament; and it is believed he was thus paid, not for signing, or knowing how to sign, his name, but for talking, and knowing how to talk. Upon a question of peace or war, the probity of this orator must have found itself in somewhat an awkward predicament, continually besieged as it must have been by *Bellona* with the offer of an enormous revenue, which was to cease immediately he suffered himself to be corrupted by *Peace*. When the question of economical reform was upon the carpet, this place was not forgotten. It was generally felt at that time, that so decided an opposition between interest and duty was calculated to produce the most pernicious consequences. The emoluments of peace and war were, therefore, equalized by attaching a fixed salary to the office, and the same plan was adopted with respect to various other offices.

In running over the list of functionaries, from the highest to the lowest, one cannot but be alarmed at the vast proportion of them who watch for war as for a prey. It is impossible to say to what a degree, by this personal interest, the most important measures of government are determined. It cannot be supposed that ministers of state, generals, admirals, or members of parliament, are influenced in the slightest degree by a vile pecuniary interest. All these honourable persons possess probity as well as wisdom, so that a trifle of money never can produce the slightest influence upon their conduct, not even the effect of an atom upon the immoveable mass of their probity. The mischief is, that evil-minded persons are not convinced by their assertion, but continue to repeat, that — "The honesty which resists temptation is most noble, but that which flies from it is most secure." *

* "Judge A. has a noble soul," was one day said to me by one of his friends: "this is what he told me was the difference between himself

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4. In public and private works of all descriptions, it is customary to pay the architect a per centage upon the aggregate amount expended. This arrangement is a good one, when the sum to be expended is fixed: there is danger in the contrary case, since the greater the expense, the greater is the architect's pecuniary profit.

5. Veracity is one of the most important bases of human society. The due administration of justice absolutely depends upon it; whatever tends to weaken it, saps the foundations of morality, security, and happiness. The more we reflect on its importance, the more we shall be astonished that legislators have so indiscreetly multiplied the operations which tend to weaken its influence.*

When the possession of the revenues, or other privileges attached to a certain condition of life, depends upon the previous performance of certain acts which are required at entering upon that condition, these privileges cannot fail to operate upon individuals as incentives to the performance of those acts: the effect produced is the same as if they were attached to such performance under the title of reward.

If, among the number of these acts, promises which are never performed are required under the sanction of an oath, these privileges or other advantages can only be regarded as rewards offered for the commission of perjury. If among the number of these acts, it be required that certain opinions which are not believed should be pretended to be believed, these advantages are neither more nor less than rewards offered for insincerity. But the sanction of an oath once contemned, is contemned at all times. Oaths may afterwards be observed, but they will not be observed because they are oaths.

In the university of Oxford, among whose members the greater number of ecclesiastical benefices are bestowed, and which even for laymen is the most fashionable place of education, — when a young man presents himself for admission, his tutor, who is generally a clergyman, and the vice-chancellor, who is also a clergyman, put into his hands a book of statutes, of which they cause him to swear to observe every one. At the same time, it is perfectly well known to this vice-chancellor and to this tutor, that there never has been any person who was able to observe all these statutes. It is thus that the first lesson this young man learns, and the only lesson he is sure to learn, is a lesson of perjury.†

Nor is this all: his next step is to subscribe, in testimony of his belief, to a dogmatical formulary composed about two centuries ago, asserted by the Church of England to be infallibly true, and by most other churches believed to be as infallibly false. By this expedient, one class of men is excluded, while three classes are admitted. The class excluded is composed of men who, either from a sense of honour, or from conscientious motives, cannot prevail upon themselves publicly and deliberately to utter a lie. The classes admitted consist — 1. Of those who literally believe these dogmas; 2. Of those who disbelieve them; 3. Of those who sign them as they would sign the Alcoran, without knowing what they sign, or what they think about it. A nearly similar practice is pursued at Cambridge; and from these two sources the clergy of the Church of England are supplied.

Socrates was accused as a corruptor of youth. What was meant by this accusation, I know not. But this I know, that to instruct the young in falsehood and perjury, is to corrupt them; and that the benefit of all the other lessons they can learn can never equal the mischief of this instruction.‡

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and Judge B. Consider him well: he will never listen to a single word which has the slightest connexion with any suit which may be brought before him, unless in open court: he fears lest he should be misled, so weak is he: he has told me so himself. Whilst, as to me, a suitor might whisper in my ear, from morning till night, and might as well have been talking to a deaf man."

I would not insinuate the least suspicion against the valorous judge; had I been constrained to form one, it would have been dissipated by the elogium he bestowed upon his friend.

The heroism of Lord Hale, the model of the English judges, took a contrary direction. It had been customary, when upon the circuit, for the judge to receive from the sheriff a certain number of loaves of sugar. On one occasion, a sheriff who happened to have a suit which was to be tried before him, waited upon his lordship, and, as was customary, presented his sugar: Hale would not receive it. The other judge, if he had been consistent, would have taken sugar from everybody.

General rule. — When an honest man is desirous of establishing his honesty, he ought to employ proofs which will serve only for this purpose, and not such as dishonesty alone can be interested in causing to be received.

Before an assembly of the Roman people, it was required of Scipio that he should render his accounts. His answer was — "Romans, on such a day I gained a victory: let us ascend to the Capitol, and return thanks to the Gods." His quietus was granted immediately; and since that day, besides allowing that Scipio was a great warrior, all the historians have been assured of the correctness of his accounts. As to me, had I lived at that time, most probably I should have gone up with the rest to the Capitol, but I should always have retained a little curiosity with respect to the accounts.

* See *Principles of Penal Law*, Part III. Chap. XVIII. *Of the Employment of the Religious Sanction*, Vol. I. p. 564.

† See further upon this subject in Mr. Bentham's work, entitled, *Swear not at all*, Vol. V. of this collection.

‡ See Appendix (A.)

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6. It may be inquired, whether rewards or other advantages ought to be offered for the defence of any opinion in matters of theory or science, or any other subject upon which opinions are divided?* If the question be one of pure curiosity, the worst that can happen will be that the reward will be expended in waste. But if the opinion thus favoured happen to be a false one, and at the same time mischievous, the reward will be productive of unmixed evil. But whether it be a question of curiosity or use, if truth be the object desired, the chance of obtaining it is not so great as when the candidates for reward are allowed to seek it wheresoever it may be to be found. If error be to be defended, to offer a reward for its defence would be one, if not the only, method to be adopted. Who is there that does not perceive, that to obtain true testimony, it is inexpedient to offer a reward to the witness who shall depose upon a given side? — who does not know that the constant effect of such an offer is to discredit the cause of him who makes it? If, then, anything be to be gained by such partiality, it can only be by error: truth can only be a loser by such partial reward.

This practice is attended with another and more manifest inconvenience: it is that of causing opinions to be professed which are not believed — of inducing a truculent exchange, not only of truth, but of sincerity, for money.

I do not know if governments ought even to permit individuals to offer rewards upon these conditions. To establish error, to repudiate truth, to suborn falsehood; — these, in a few words, are the effects of all rewards established in favour of one system to the exclusion of all others.

7. Charity is ever an amiable virtue; but if injudiciously employed, it is liable to produce more evil than good. Hospitals inconsiderately multiplied, regular distributions of provisions, such as were formerly made at the doors of many convents in Spain and Italy, tend to habituate a large proportion of the people to idleness and beggary. A reward thus offered to indolence, impoverishes the state and corrupts the people. *Luxury* (and I annex to this word whatever meaning, except that of prodigality, people choose to give to it) luxury, that pretended vice so much reprobated by the envious and melancholic, is the steady and natural benefactor of the human species; it is a master who is always doing good, even when he aims not at it; he rewards only the industrious. Charity is also a benefactor, but great circumspection is required that it may prove so.

8. There is another manner in which reward may be mischievous: by acting in opposition to the service required — when, for example, the emoluments attached to an office are such as to afford the means and temptation not to fulfil the duties of it. In such a case, what may appear a paradox is not the less a great truth: *the whole does less than a part;* by paying too much, the sovereign is less effectually served. But this subject belongs naturally to the head of *salaries.*

9. Whatever weakens the connexion between punishments and offences, operates in proportion as an encouragement to the commission of offences. It has the effect of a reward offered for their perpetration, for whether the inducement to commit offences be augmented, or the restraining motives debilitated, the result in both cases is the same.

Thus, a tax on justice is an indirect reward offered for injustice. The same is the case with respect to all technical rules by which, independently of the merits, nullities are introduced into contracts and into procedure — of every rule that excludes the evidence of a witness, the only depository of the fact upon which depends the due administration of justice. In a word, it is the same with every thing that tends to loosen the connexion between injury and compensation, between the violation of the law and punishment.

If we open our eyes, we shall behold the same legislators establishing rewards for informers, and taxes and fees upon law proceedings: they desire that the first should induce men to render them services of which they stand in need, whilst the latter tend to weaken the natural disposition which is felt to render these same services. At the threshold of the tribunal of justice are placed a bait and a bugbear: the bait operates upon the few — the bugbear upon the multitude.

10. There are cases in which, to avoid a greater inconvenience, it has been found necessary to dispose of the matter of reward in such manner as that it shall operate as a reward for the most atrocious crime; yet, in spite of the force of the temptation, this crime is almost unexampled. I allude to the rule established with respect to successions. Happily, whatever may be the force of the seductive motives in this case, the tutelary motives act in full concert with all their energy. There are many men who for a trifling personal benefit, for an advance in rank, or even to gratify their spleen, would without scruple use their utmost exertions to produce a war that would cost the lives of two or three hundred thousand of their fellow-creatures; while among these men there would not be found perhaps one, who, though he were set free from the dread of legal punishment, could be induced, for a much greater advantage, to attempt the life of a single individual, and still less the life of a parent whose death would put him in possession of a fortune or a title.

* See Appendix (B.)

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But though laws cannot be framed for its complete removal, nothing which can be done without inconvenience, ought to be left undone, towards the diminution of this danger. The persons most exposed to become its victims, are those who are necessarily placed under the controul of others, such as infants and women. It is under the guidance of this principle, that our laws in some cases have selected as guardians those persons upon whom no interest can devolve in the way of succession. Under the laws of Sweden, precautions of the same description are observed; and it has been elsewhere shown that this consideration furnishes one of the arguments in favour of the liberty of divorce.*

Contracts relating to insurance furnish another instance of the same danger. These contracts, in other respects so beneficial, have given birth to a new species of crime. A man insures a ship or a house at a price greatly beyond its value, with the intention of setting fire to the house or causing the ship to be lost, and then, under pretence of compensation for the loss of which he is the author, claims the money for which the insurance is made. Thus one of the most beneficial inventions of civilized society is converted into a premium for dishonesty, and a punishment to virtuous industry. Had the commission of this crime been attended with less risk, or been less difficult to conceal, this most admirable contrivance for softening inevitable calamities must have been abandoned.

CHAPTER IX.

REMUNERATION — WHERE NEEDLESS.

Factitious reward is superfluous, whenever natural reward is adequate to produce the desired effect.

Under this head may be classed all inventions in the arts, which are useful to individuals, and whose products may become articles of commerce. In the ordinary course of commerce, the inventor will meet with a natural reward exactly proportionate to the utility of his discovery, and which will unite within itself all the qualities which can be desired in a factitious reward. After the most mature consideration, no sovereign can find another measure so exact as is thus afforded by the free operations of trade. All that the government has to do is to secure for a time, to the inventor, whatever benefit his discovery may yield. This is generally done by the grant of an exclusive privilege or patent. Of this we shall elsewhere speak more in detail.

Not many years ago a grant of £3000 was made by parliament to a physician for the discovery of a yellow dye. That money might, without doubt, have been worse employed. But the reward was unnecessary: for this discovery, as for all others in the arts, the proper test of its utility would have been its use in manufactures and commerce. The grant of a determinate sum was a loss either to the inventor or to the public: to the inventor, if it were less than he would have gained under a patent: to the public, if it were more. In a word, wherever patents for inventions are in use, factitious reward is either groundless or superfluous.†

I shall elsewhere treat of the encouragements to be given to the arts and sciences. Upon the present occasion, all that I shall observe is, that the greater the progress they have made, the less necessary is it to tax the public for their support. In this country, for example, if the exclusive property in his work be secured to an author, a reward is at the same time secured to him proportionate to the service he has performed—at least in every branch of amusement or instruction that yields a sufficient class of readers. There is no patron to be compared with the public; and by the honour with which it accompanies the other rewards it bestows, this patronage has a decided advantage over any that can be received from any other source.

With respect to the rewards that in some European states have been bestowed upon poets, the amount of them is so insignificant as to save them from the severe scrutiny to which they might, under other circumstances, have found themselves exposed. There are some countries in which the relish for literature is confined to such small numbers, that it may, upon the whole, be beneficial to encourage it by factitious rewards. But if we consider how intense are the enjoyments of the man born with poetic talents, the sudden reputation which they produce, and the ample profit they often yield, especially in the dramatic line, it will be found that the na-

* See *Principles of the Civil Code*, Vol. I. p. 352.

† Parliament has granted, in two several sums, £20,000 to Dr. Jenner, so celebrated by his invention or introduction of the system of vaccination. This may be considered, perhaps, rather as an indemnification than a reward — at least than a reward proportionate to the service: I say indemnification, because the labour, the researches, the correspondence, the time employed in committing to writing, in teaching and in establishing, his new system, were so many sacrifices of the profits of his profession. As to the natural reward that he gained by his discovery, it was nothing: it impoverished instead of enriching him. The liberality with which the physicians throughout Europe have encouraged a discovery that has lopped off one of the most lucrative branches of their profession, is a most hononurable feature in the annals of medicine. When shall we see the lawyers entering into rivalship with them, by the discovery and propagation of the most simple and expeditious mode of legal procedure?

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tural rewards attached to them are far from being inconsiderable; and that, at least, our attention ought, in the first place, to be directed to the department of the sciences, the approaches to which are repulsive, and the utility of which is indisputable. Happiness depends upon the correctness of the facts with which our mind is furnished, and the rectitude of our judgment; but poetry has no very direct tendency to produce either correctness of knowledge or rectitude of judgment. For one instance in which it has been employed to combat mischievous prejudices, a thousand might be cited in which they have been fostered and propagated by it. Homer is the greatest of poets: where shall we place him among moralists? Can any great advantage be derived from the imitation of his gods and heroes? I do not condemn prizes for poetry where the object is to excite youthful emulation: I only desire that serious and truly useful pursuits may receive a proportionate encouragement.

CHAPTER X.

PROPORTION AS TO REWARDS.

IN conferring reward, the observance of exact rules of proportion is not nearly of the same importance, as in the infliction of punishment. These rules cannot, however, be neglected with impunity. If too great a reward be held out for a given service, competitors will be attracted from more useful pursuits. If too little, the desired service will either not be rendered, or will not be rendered in perfection.

Rule I. The aggregate value of the natural and factitious reward ought not to be less than sufficient to outweigh the burthen of the service.

Rule II. Factitious rewards may be diminished, in proportion as natural rewards are increased.

These two rules present three subjects to our observation: — 1. The natural burthens attached to the service; — 2. The natural rewards which either do or do not require factitious reward to supply their deficiency; — 3. The drawback, more or less hidden, which in a variety of cases alters the apparent value of the reward.

1. The natural burthens of any particular service, may be comprised under the following heads:—The intensity of labour required in its performance, — the ulterior uneasiness which may arise from its particular character, — the physical danger attending it, — the expenses or other sacrifices necessarily made previously to its exercise, — the discredit attached to it, — the peculiar enmities it produces. The wages of labour in different branches of trade, are regulated in exact proportion to the combination of these several circumstances. To the legislator, however, except in cases where it may be necessary to add factitious to natural reward, considerations of this sort are in general subjects only of speculation.*

That any particular service is more or less highly priced, is of little importance: it affects the individuals only who stand in need of it. The competition between those who want and those who can supply, fixes the price of all services in the most fitting manner. It is sufficient that the demand be public and free. To assist, if necessary, in giving publicity to the demand, and in maintaining reciprocal liberty in such transactions, is all that the legislator ought do do.

2. Natural rewards are liable to be insufficient, in relation to services, whose utility extends to the whole community, without producing particular advantage to any one individual more than another. Of this nature are public employments. It is true, many public employments are attended by natural rewards in the shape of honour, power, the means of serving one's connexions, and deserving the public gratitude; and when these rewards are sufficient, factitious rewards are superfluous. To their ambassadors, and many others of their great officers of state, the Venetians never gave any pecuniary reward. In England, the public functions of sheriffs and justices of the peace are generally discharged by opulent and independent individuals, whose only reward consists in the respect and power attached to those offices.

3. There are many circumstances which may diminish the value of a reward, without being generally known beforehand, but against all of which it is proper to guard. Does the reward consist of money? Its value may be diminished by a burthen of the same nature, or by a burthen in the shape of honour. Honour and money may even be seen at strife with one another, as well as with themselves. By these means, the value of a reward may sometimes be reduced to nothing, and even become negative.

In this country, where, properly speaking, there is no public prosecutor, many offences, which no individual has any peculiar interest in prosecuting, are liable to remain unpunished. In the way of remedy, the law offers from £10 to £20, to be levied upon the goods of the offender, to whoever will successfully undertake this function: sometimes it is added, that the expenses will be repaid in case of conviction: sometimes this is not promised. These expenses may amount to thirty, fifty, and even one hundred pounds; it is seldom

* In *The Wealth of Nations*, b. i. chap. x. the circumstances which cause the rate of wages to vary in different employments, are analyzed with the sagacity which characterizes the father of political economy.

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they are so little as twenty pounds. After this, can we be surprised that the laws are imperfectly obeyed?

It may be added, that it is considered dishonourable to attend to this summons of the laws. An individual who in this manner endeavours to serve his country, is called an informer; and lest public opinion should not be sufficient to brand him with infamy, the servants of the law, and even the laws themselves, have on some occasions endeavoured to fix the stain. The number of private prosecutors would be much more numerous, if, instead of the insidious offer of a reward, an indemnification were substituted. The dishonourable offer being suppressed, the dishonour itself would cease. And who can say, when by such an arrangement the circumstance which offends it is removed, whether honour itself may not be pressed into the service of the laws?

There is another case in which, by the negligence of legal and official arrangements, a considerable and certain expense is attached to and made to precede a variable and uncertain reward. A new idea presents itself to some workman or artist. Knowing that the laws grant to every inventor a privilege to enable him exclusively to reap the profits of his invention, he enjoys by anticipation his success, and labours to perfect his invention. Having, in the prosecution of his discovery, consumed, perhaps, the greater part of his property and his life, his invention is complete. He goes, with a joyful heart, to the public office to ask for his patent. But what does he encounter? Clerks, lawyers, and officers of state, who reap beforehand the fruits of his industry. This privilege is not given, but is, in fact, *sold* for from £100 to £200 — sums greater perhaps than he ever possessed in his life. He finds himself caught in a snare, which the law, or rather extortion which has obtained the force of law, has spread for the industrious inventor. It is a tax levied upon ingenuity, and no man can set bounds to the value of the services it may have lost to the nation.

Rule III. Reward should be adjusted in such a manner to each particular service, that for every part of the benefit there may be a motive to induce a man to give birth to it.

In other words, the value of the reward ought to advance step by step with the value of the service. This rule is more accurately followed in respect of rewards than of punishments. If a man steal a quantity of corn, the punishment is the same, whether he steal one bushel or ten; but when a premium is given for the exportation of corn, the amount of the premium bears an exact proportion to the amount exported. To be consistent in matters of legislation, the scale ought to be as regular in the one case as in the other.

The utility of this rule is put beyond doubt by the difference that may be observed between the quantity of work performed by men employed by the day, and men employed by the piece. When a ditch is to be dug, and the work is divided between one set of men working by the day, and another set working by the piece, there is no difficulty in predicting which set will have finished first.

Hope, and perhaps emulation, are the motives which actuate the labourer by the piece: the motive which actuates the labourer by the day is fear — fear of being discharged in case of manifest and extraordinary idleness.

It must not, however, be forgotten, that there are many sorts of work in respect of which it is improper to adopt this mode of payment; which tends indeed to produce the greatest quantity of labour, but at the same time is calculated to give birth to negligence and precipitation. This method ought only to be employed in cases where the quality of the work can easily be discerned, and its imperfections (if any) detected.

The value of a reward may be increased or diminished, in respect of certainty as well as amount: when, therefore, any services require frequently renewed efforts, it is desirable that each effort should render the probability of its attainment more certain.

Arrangements should be made for connecting services with reward, in such manner that the attainment of the reward shall remain uncertain, without, however, ceasing to be more probable than the contrary event. The faculties of the individual employed will thus naturally be kept upon the full stretch. This is accomplished when a competition is established between two or more persons, and a reward is promised to that one who shall render service in the most eminent degree, whether it respect the quantity or the quality of the service proposed.

Rule IV. When two services come in competition, of which a man cannot be induced to perform both, the reward for the greater service ought to be sufficient to induce him to prefer it to the less.

In a certain country, matters are so arranged, that more is to be gained by building ships on the old plan, than by inventing better; by taking one ship, than by blockading a hundred; by plundering at sea, than by fighting; by distorting the established laws, than by executing them; by clamouring for or against ministers, than by showing in what manner the laws may be improved. It must however be admitted, that in respect of some of these abuses, it would be difficult to prescribe the proper remedy.

By what method can competition between two services be established? The individual from whom they are required must, either from personal qualifications or external circumstances, have it in his power to render either the one or the other. It is proper to

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distinguish the cases in which this position is transient, from those in which it is permanent. It is in the first that the fault committed, by suffering disproportion to subsist, is most irreparable.

During the American war, upwards of an hundred ships were at one time in one of the harbours of the revolted colonies. It was of great importance that they should be kept in a state of blockade, since many of them were loaded with military stores. An English captain received orders to blockade them. Sufficiently skilled in arithmetic, and in proverbs, to know that two or three birds in his cage were worth a hundred in the bush, he acted as the greater number of men would have acted in his place. He stood off to a sufficient distance to give the enemy hopes of escaping: as soon as they had quitted the harbour, he returned, captured half-a-dozen, and the rest proceeded to their destination. I do not answer for the truth of this anecdote; but true or not true, it is equally good as an apologue. It exhibits one of the fruits of that inconsiderate prodigality, which grants, without discrimination, the produce of their captures to the captors.

Another example. A man who has influence obtains the command of a frigate, with orders to go upon a cruise. The command of a first-rate is accepted by those only who cannot obtain a frigate. It is thus that interest is put in competition with duty — cupidity with glory. There are doubtless not wanting noble minds by whom the seductions of sinister interest are resisted: but wherefore should they be so much exposed to what it is so difficult to resist?

It is true, that their ears may not be altogether insensible to the call of honour. The law has bestowed pecuniary rewards upon the captors of armed vessels — (another example, where one instance of profusion has created the necessity of a second) — but these rewards are still unequal: the chase of doves is more advantageous than the pursuit of eagles.

The remedy would be to tax, and tax heavily, the profits of lucrative cruises, to form a fund of reward in favour of dangerous, or merely useful expeditions. By this arrangement, the country would be doubly benefited, the service would be rendered more attractive, and conducted with more economy. It may be true, that if this tax were deducted from the share of the seamen, their ardour might be cooled: neither in value or in number are their prizes in this lottery susceptible of diminution. But though this be true with respect to the lower ranks of the profession, ought we to judge in the same manner of the superior officers, whose minds are elevated as their rank, and on whose conduct the performance of the duty has the most immediate dependence?

In the judicial department, the service which belongs to the profession of an advocate, and the service which belongs to the office of a judge, are in a state of rivalry: they constitute the elements of two permanent conditions, of which the first among most nations is the preliminary route to the second. In England, the judges are uniformly selected from among the class of advocates. Now the interest of the country requires that the choice should fall upon the men of highest attainments in their profession, since upon the reputation of the judges depends the opinion which every man forms of his security. It is not of the same importance to the public that advocates should be supereminently skilful: their occupation is not to seek out what is agreeable to justice, but what agrees with the interest of the party to which chance has engaged them. On the contrary, the more decidedly any advocate is exalted in point of talents above his colleagues, the more desirable is it that he should no longer continue an advocate. In proportion to his pre-eminence, is the probability that he will be opposed to the distribution of justice. The worse the cause of the suitor, the more pressing is his need of an able advocate to remedy his weakness.

	Per Annum.
In England, the emoluments of the Lord Chancellor are reckoned at	£20,000
— Vice-Chancellor,	5,000
— Master of the Rolls,	4,000
— Chief-Justice of the King's Bench,	6,500
— Chief-Justice of the Common Pleas,	5,000
— Chief-Baron of the Exchequer,	5,000
— Nine Puisne Judges,	4,000

Now, amongst the class of advocates there are always to be found about half-a-dozen whose annual emoluments average from eight to twelve thousand pounds. Of this number there is not one who would not disdain the office of puisne judge, since his profits are actually two or three times as great as theirs. To these advocates of the first class may be added as many more, who would equally disdain these subordinate situations, in the hope every day of succeeding to the advocates who shall succeed to the principal situations. There are two methods of obviating this inconvenience: the one by increasing the emoluments of the judges. (This course has been adopted upon many occasions, and they have been raised to their present amount, without success.) The other consists in lowering the profits of the advocates: a desirable object in more respects than one, but which can result only from rendering the whole system of the laws more simple and intelligible.

In the department of education, there is a nearly similar rivalry between the profession of the clergy and the office of professor, as between the profession of advocate and the

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office of judge, in the department of the laws. In proportion as he is what he ought to be in order to be useful, a clergyman is a professor of morality, having for his pupils a larger or smaller number of persons of every class, during the whole course of their lives. On the other hand, a professor (as he is called) has for his pupils a number of select individuals, whose character is calculated to exercise the greatest influence upon the general mass of the people, and among their number the clergy are generally to be found. The period during which these individuals attend the lectures of the professor is the most critical period of life — the only period during which they are under obligation to pay attention to what they hear, or to receive the instruction presented to them. Such being the relation between the services of the two classes, let us see what is the proportion between the amount of reward respectively allotted to each.

In England, the emoluments of the clergy vary from £20 to £10,000 a-year, while those of the professors in the chief seats of education — the universities — are between the twentieth and the hundredth part of the latter sum. In Scotland, the emoluments of the professors differ but little from what they are in England, but the richest ecclesiastical benefice is scarcely equal to the least productive professorship. It is thus, says Adam Smith, that "in England the church is continually draining the universities of all their best and ablest members; and an old college tutor, who is known and distinguished as an eminent man of letters, is rarely to be found;" whilst in Scotland the case is exactly the reverse. It is by the influence of this circumstance that he explains how academical education is so excellent in the Scottish universities, and, according to him, so defective in those of England.

Between two professions which do not enter into competition with each other (for example, those of opera-dancers and clergymen,) a disproportion between their emoluments is not attended with such palpable inconveniences; but when by any circumstance two professions are brought into comparison with each other, the least advantageous loses its value by the comparison, and the disproportion presents to the eye of the observer the idea of injustice.

CHAPTER XI.

CHOICE AS TO REWARDS.

In making a proper selection of punishments, much skill is required: comparatively much less is requisite in the proper selection of rewards. Not only are the species of rewards more limited in number than those of punishments, but the grounds of preference are more easily discoverable, and there are not, as in the case of punishments, any passions which tend to mislead the judgment.

The *qualities desirable* in rewards are the same as in the case of punishments: we shall enumerate them, and then proceed to point out in what degree they are united in certain modes of remuneration.

A reward is best adapted to fulfil the purpose for which it may be designed, when it is —

1. *Variable*, susceptible of increase or diminution in respect of amount, that it may be proportioned to the different degrees of of service.

2. *Equable*, that equal portions may at all times operate with equal force upon all individuals.

3. *Commensurable*, with respect to other species of rewards attached to other services.

4. *Exemplary:* its apparent ought not to differ from its real value. This quality is wanting, when a large expense is incurred for the purpose of reward, without its becoming matter of notoriety. The object aimed at ought to be to strike the attention, and produce a durable impression.

5. *Economical.* More ought not to be paid for a service than it is worth. This is the rule in every market.

6. *Characteristic:* as far as possible analogous to the service. It becomes by this means the more exemplary.

7. *Popular.* It ought not to oppose established prejudices. In vain did the Roman emperors bestow honours upon the most odious informers; they degraded the honours, but the informers were not the less infamous. But it is not enough that it does not oppose the prejudices: it is desirable that every reward should obtain the approbation of the public.

8. *Fructifying:* calculated to excite the perseverance of the individual in the career of service, and to supply him with new resources.

In the selection from among the variety of rewards, of that particular one which most certainly will produce any desired effect, attention must not only be paid to the nature of the service, but also to the particular disposition and character of the individual upon whom it is to operate.* In this respect, public regulations can never attain the perfection of which domestic discipline is susceptible. No sovereign can ever in the same degree be acquainted with the dispositions of his subjects, as a father may be with those of his children. This disadvantage is however compensated by the larger number of com-

* See *Principles of Morals and Legislation*, Chap. VI. *Of Circumstances influencing Sensibility*, Vol. I. p. 21.

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petitors. In a kingdom, every diversity of temperament, and every degree of aptitude, may be found united together; and provided the reward be proportionate to the service, it will be of little importance what may be its nature: like the magnet, which out of a heterogeneous mass attracts and separates the most hidden particles of iron, it will detect the individual susceptible of its attraction. Besides, the nature of pecuniary reward, which is adapted to the greater proportion of services, is such that every individual may convert it into the species of pleasure which he most prefers.

To form a judgment of the merits and demerits of pecuniary reward, a glance at the list of desirable qualities will suffice. It will at once be seen which of them it possesses, and of which of them it is deficient: it is *variable, equable,* and *commensurable.* It ought to be added, that it is frequently indispensably necessary: there are many cases in which every other reward, separated from this, would not only be a burthen, but even a mockery, especially if the performance of the service have been attended with an expense or loss greater than the individual can easily support.

On the other hand, pecuniary reward is not exempt from disadvantages. Speaking generally (for there are many exceptions,) it is neither *exemplary,* nor *characteristic,* nor even *popular.** When allowed to exceed a certain amount, it tends to diminish the activity of the receiver: instead of adding to his inclination to persevere in his services, it may furnish him with a temptation to discontinue them. The enriched man will be apt to think like the soldier of Lucullus, who became timid so soon as he possessed property to preserve.

> Ibit eò, quo vis, qui zonam perdidit, inquit.
> HOR. Epist. II. lib. 2.

There are also cases in which money, instead of an attractive, may have a repulsive effect,—instead of operating as a reward, may be considered as an insult, at least by persons who possess any delicacy in their sentiments of honour. A certain degree of skill is therefore required in the application of money as a reward: it is oftentimes desirable that the pecuniary should appear only as an accessary to the honorary, which should be made to constitute the principal part of the reward.†

Every pecuniary reward may be, as it were, annihilated by its relative smallness. A man of independent fortune, and of a certain rank in society, would be considered as degraded by accepting a sum that would not degrade a mechanic. There is no rule for determining what is permitted or prohibited in this respect: custom has established the prejudice. But the difficulty it presents is not insurmountable. By combining together money and honour, a compound is formed, which is universally pleasing: medals, for example, possess this double advantage. By a little art and precaution, a solid peace is established between pride and cupidity; and thus united, they have both been ranged under the banners of merit. Pride proclaims aloud—"It is not the intrinsic value of the metal which possesses attractions for me; it is the circle of glory alone with which it is surrounded." Cupidity makes its calculation in silence, and accurately estimates the value of the material of the prize.

By the Society of Arts a still higher degree of perfection has been attained. A choice is commonly allowed between a sum of money and a medal. Thus all conditions and tastes are satisfied: the mechanic or peasant pockets the money; the peer or gentleman ornaments his cabinet with a medal.

The apparent value of medals is in some cases augmented, by rendering the design upon them characteristic of the service on account of which they are bestowed. By the addition of the name of the individual rewarded, an exclusive certificate is made in his favour. The ingenuity displayed in the choice of the design has sometimes been extremely happy.

A British statute gives to the person who apprehends and convicts a highwayman, amongst other rewards, the horse on which the offender was mounted when he committed the offence. Possibly the framer of this law may have taken the hint from the passage in Virgil, in which the son of Æneas promises to Nisus, in case of the success of the expedition he was meditating, the very horse and accoutrements which Turnus had been seen to use.‡ It is equally possible, that the same knowledge of human nature, which suggested to the Latin poet the effi-

* "*Au défaut de n'être pas dignes de la vertu,* les recompenses pécuniaires joignent celui de n'être pas assez publiques, de ne pas parler sans cesse aux yeux et aux cœurs, de disparaitre aussitôt qu'elles sont accordées, et de ne laisser aucune trace visible qui excite l'emulation en perpétuant l'honneur qui doit les accompagner." — Rousseau: *Gouvernment de Pologne,* chap. xi. The phrase in italics is one of the too common exaggerations in the writings of Rousseau. It is more striking than just.

In his letter to the Duke of Wirtemberg upon education, in which he shows that he had reflected much upon the union of interest with duty, he says—"L'argent est un ressort dans la mécanique morale, mais il repousse *toujours* la main qui le fait agir." *Toujours* is an exaggeration.

† Tel donne à pleines mains qui n'oblige personne,
La façon de donner vaut mieux que ce qu'on donne. *Le Menteur,* Scène I.

‡ Vidisti, quo Turnus equo, quibus ibat in armis
Aureus; ipsum illum clypeum, cristasque rubentes
Excipiam sorti, jam nunc tua præmia, Nise.
Æn. ix. 269.

Thou saw'st the courser by proud Turnus prest:
That, Nisus, and his arms and nodding crest,
And shield, from chance exempt, shall be thy share. DRYDEN'S *Translation.*

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cacy of such a reward, suggested it at once to the English lawgiver. Be this as it may, this provision is commendable on three several accounts. In the assignment of the prize, it pitches upon an object, which, from the nature of the transaction, is likely to make a particular impression on the mind of the person whose assistance is required; acting in this respect in conformity to the rule above laid down, which recommends an attention to the circumstances influencing the sensibility of the person on whom impression is to be made. It also has the advantage of being characteristic, as well as exemplary. The animal, when thus transferred, becomes a voucher for the activity and prowess of its owner, as well as a trophy of his victory.

An arrangement like this, simple as it is, or rather because it is so simple, was an extraordinary stretch in British policy; in which, though there is generally a great mixture of good sense, there reigns throughout a kind of littleness and *mauvaise honte*, which avoids, with timid caution, everything that is bold, striking, and eccentric, scarcely ever hazarding any of those strong and masterly touches which strike the imagination, and fill the mind with the idea of the sublime.

Examples of rewards of this nature abound in the Roman system of remuneration. For every species of merit, appropriate symbolic crowns were provided. This branch of their administration preserved the ancient simplicity of Rome in its cradle; and the wreath of parsley long eclipsed the splendour of the crowns of gold. I was about to speak of their triumphs, but here I am compelled to stop: humanity shudders at that pride of conquest which treads under its feet the vanquished nations. The system of legislation ought no doubt to be adapted to the encouragement of military ardour, but it ought not to fan it into such a flame as to make it the predominant passion of the people, and to prostrate everything before it.

Honorary rewards are eminently exemplary: they are standing monuments of the service for which they have been bestowed; they also possess the desirable property of operating as a perpetual encouragement to fresh exertions. To disgrace an honorary reward, is to be a traitor to one's self; he that has once been pronounced brave, should perpetually merit that commendation.

To create a reward of this nature, is not very difficult. The symbolical language of esteem is, like written language, matter of convention. Every mode of dress, every ceremony, so soon as it is made a mark of preeminence, becomes honourable. A branch of laurel, a ribband, a garter — everything possesses the value which is assigned to it. It is however desirable, that these ensigns should possess some emblematic character expressive of the nature of the service for which they are bestowed. With reference to this principle, the blazonry of heraldry appears rude and unmeaning. The decorations of the various orders of knighthood, though not deficient in splendour, are highly deficient in respect of character: they strike the eye, but they convey no instruction to the mind. A ribband appears more like the finery of a woman, than the distinctive decoration of a hero.

Honorary titles have frequently derived a part of their glory from being characteristic. The place which has been the theatre of his exploits has often furnished a title for a victorious general, well calculated to perpetuate the memory of his services and his glory. At a very early period of their history, the Romans employed this expedient in addition to the other rewards which they conferred upon the general who completed a conquest. — Hence the surnames of *Africanus*, *Numidicus*, *Asiaticus*, *Germanicus*, and so many others. This custom has frequently been imitated. Catherine II. revived it in favour of the Romanoffs and Orloffs. Mahon, twice in the eighteenth century, furnished titles to its conquerors. The mansion of Blenheim unites to the eclat of the name, a more substantial proof of national gratitude.*

The Romans occasionally applied the same mode of reward to services of a different description. The Appian way perpetually recalled to the memory of those who journeyed on it, the liberality of Appius.†

The career of legislation may also furnish some instances of honours which possess this character of analogy. In the digest of the Sardinian laws, very praiseworthy care was taken to inform the people to which of their sovereigns they were indebted for each particular law. It is an example worthy of imitation. It may have been intended as a mark of respect, as well as for convenience of reference, that it has been customary to designate by the title of the *Grenville Act*, the admirable law which this representative of the people procured to be enacted for the impartial decision of questions relative to contested elections.

Had the statue of this legislator been placed

* When, after a great naval victory, as an acknowledgment of his services, the freedom of the city of London was presented to Admiral Keppel, in a box of *heart of oak* of curious workmanship, and enriched with gold, the present was *characteristic* and *popular*; allusion being evidently made to the song, which, whoever may have been the Tyrtæus, has doubtless had, at times, no inconsiderable share in rousing British courage.

† One of the noblest charitable institutions in London, *Guy's Hospital*, bears the name of its founder. It is true, it is not done with the intention of conferring a reward; but there are few who of late years have travelled in Great Britain, who have not spoken in praise of *Macadam's system* of constructing roads, now called Macadamization.

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in the House of Commons, from which he banished a scandalous disorder, it would both have been a monument of gratitude, and a noble lesson: it might have for its companion a statue of his noble rival, the author of Economical Reform. It is thus that the impartial judgment of posterity, forgetting the differences which separated them, delights to recollect the excellencies which assimilated them to each other: it is thus that it has placed, side by side of each other, Eschines and Demosthenes. The more men become enlightened, the more clearly will they perceive the necessity, at least, of dividing honour between those who cause nations to flourish by means of good laws, and those who defend them by their valour.

Among the most obvious and efficacious means of conferring honorary rewards, are pictures, busts, statues, and other imitative representations of the person meant to be rewarded. These spread his fame to posterity, and, in conjunction with the history of the service, hand down the idea of the person by whom it was rendered. They are naturally accompanied with inscriptions explanatory of the cause for which the honour was decreed. When the art of writing has become common, these inscriptions will frequently give disgust, by the length or extravagance of the elogium; and it will then become an object of good taste to say as much in as few words as possible. Perhaps the happiest specimens of the kind that were, or ever will be produced, are the two inscriptions placed under the statues of Louis XIV. and Voltaire; the one erected by the town of Montpellier, the latter by a society of men of letters, of whom Frederick III. king of Prussia was one:—"*A Louis XIV. après sa mort.*" "*A Voltaire, pendant sa vie:*" To the king, though no longer the object of hope and fear: To the poet and philosopher, though still the butt of envy. The business, on occasions like these, is not to inform but to remind: history and the art of printing do the rest.

The greater number of the rewards of which we have spoken above, are *occasional*, that is, applied to a particular action. There are others which are more *permanent* in their character, such as the Hospitals of Chelsea and Greenwich, in England, and *l'Hôtel des Invalides* at Paris.

Doubts have often been entertained of the utility of these establishments. Rewards, it has been said, might be extended to a much greater number of individuals, if the annual amount of the expenses of these places were distributed in the shape of pensions, while the individuals would thus be rendered much happier, since men who have passed their days of activity, united in a place where they are no longer subject to the cares and labours of life, are exposed to the most ceaseless listlessness. I shall not dispute the truth of these observations, but on the other hand, shall examine the effect of these establishments upon the minds of soldiers and sailors. Their imaginations are flattered by the magnificence of these retreats; it is a brilliant prospect opened to them all; an asylum is provided for those who, having quitted their country and their families in their youth, have frequently, in their days of decrepitude and age, no other home in the world. Those who are mutilated or disfigured with wounds, are consoled by the renown which awaits them in the hospital, where everything reminds them of their exploits. It may also be for the benefit of the service more prudent thus to unite than to disperse them. It is a luxury; but it is rational, exemplary, and possesses a character of justice and magnificence.

These establishments being necessarily limited with respect to the number which can be admitted into them, may be considered upon the footing of extraordinary rewards, applicable to distinguished services. They would thus constitute a species of nobility for the soldiers and sailors. They would acquire an additional degree of splendour, were their walls adorned by the trophies taken in war, which would there appear much more appropriately placed, than when deposited in the temples of peace. The decorations of the chapel of *l'Hôtel des Invalides* are admirable. The flags suspended in the cathedral of St. Paul only awaken thoughts at variance with those of religious worship: removed to Chelsea or Greenwich, they would be connected with natural associations, and would furnish a text to the commentaries of those who acquired them by their valour.

It is not often that every desirable quality is seen to be united in one and the same reward: this union, however, frequently takes place in an almost imperceptible manner.

An instance of a reward particularly well adapted to the nature of the service, is that of the monopoly which it is almost universally the custom to create in favour of inventors. From the very nature of the thing, it adapts itself with the utmost nicety to those rules of proportion to which it is most difficult for reward artificially instituted by the legislator to conform. It adapts itself with the utmost nicety to the value of the service. If confined, as it ought to be, to the precise point in which the originality of the invention consists, it is conferred with the least possible waste of expense: it causes a service to be rendered, which without it a man would not have a motive for rendering; and that only by forbidding others from doing that which, were it not for that service, it would not have been possible for them to have done. Even with regard to such inventions (for such there will be) where others, besides him

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who possesses himself of the reward, have scent of the invention, it is still of use, by stimulating all parties, and setting them to strive which shall first bring his discovery to bear. With all this it unites every property which can be wished for in a reward. It is variable, equable, commensurable, characteristic, exemplary, frugal, promotive of perseverance, subservient to compensation, popular, and revocable.

CHAPTER XII.

PROCEDURE AS TO REWARDS.

The province of reward is the last asylum of arbitrary power. In the early stages of society, punishments, pardons, and rewards, were equally lavished without measure and without necessity. The infliction of punishment has already in a measure been subject to regulation: at some future time rules will be laid down for the granting of pardons; and last of all, for the bestowment of rewards. If punishment ought not to be inflicted without formal proof of the commission of crime, neither ought reward to be conferred without equally formal proof of desert.

It may be allowed, that in point of importance, the difference between the two cases is great; that punishment inflicted without trial excites universal alarm, whilst reward conferred without desert excites no such feelings. But these considerations only prove that the advantage of formal procedure in the distribution of reward is limited to the prevention of prodigality, and of the other abuses by which the value of reward is diminished.

At Rome, if certain travellers may be believed, it is the custom, when a saint is about to be canonized, to allow an advocate, who in familiar language is called *the advocate of the devil*, to plead against his admission. If this advocate had always been faithful to his client, the calender might not have been so full as at present.* Be this as it may, the idea itself is excellent, and might advantageously be borrowed by politics from religion. *L'Italico valor non è ancor morto:* there are yet some lessons to be learned in the capital of the world.

It is reported of Peter the Great, that when he condescended to pass through every gradation of military rank, from the lowest to the highest in his empire, he took no step without producing regular certificates of his qualifications. We may be allowed to suppose, that even with inferior recommendations to those produced by this great prince, he would have succeeded. There was no *advocate for the devil* to contest the point, and even had there been one, his fidelity would have been doubtful: but had the qualifications of the Czar been as imperfect as, according to the history, they were complete, his submitting to produce them would have offered a noble lesson.

In England, when a *dormant peerage* is claimed by any individual, the *attorney-general* is constituted the advocate for the devil, and charged to examine into and produce everything which can invalidate his title. Wherefore is he not thus employed when it is proposed to create new peers? Why should he not be allowed to urge everything which can be said against the measure? Is it feared that he would be too often successful? †

In the distribution of rewards, were it always necessary publicly to assign the reason for their bestowment, a restraint would be imposed upon princes and their ministers, to which they are unwilling to submit. There formerly existed in Sweden, a custom or positive law, obliging the king to insert in the patent conferring a pension or title, the reason for the grant. In 1774, this custom was abolished by an express law inserted in the Gazette of that court, declaring that the individuals honoured by the bounty of the king should be considered as indebted to his favour alone. Did this monarch think that he stood in need of services which he would not dare publicly to acknowledge? ‡

* "Pope Urban VIII. having suffered some ill treatment from a certain noble Roman family, said to his friends, *Questa gente è molto ingrata. Io ho beatificato uno dé loro parenti, che non lo meritava.*"—*Jortin's Miscellanies.*

† If the peers are interested in not suffering the value of their office to be lessened by sharing it with unentitled persons, the public have a more important interest in preventing profusion with respect to this modification of the matter of reward — in preventing the bestowment of a portion of the sovereign power upon persons who have not purchased such a trust by any service. But if merit be not to be regarded, and there be political reasons for preserving this prerogative uncontrouled, the subject assumes another aspect, and its examination here would be out of place.

‡ Extract from the *Courier of the Lower Rhine*, 5th March 1774. — "*Stockholm*, 11*th February*. — It was formerly the custom, when the king elevated any one to the rank of nobility, or conferred on him the title of baron, to insert in the diploma the circumstances by which he had merited this distinction. But upon a late occasion, when his Majesty ennobled M. de Geer, chamberlain of the court, he requested that the kindness and good pleasure of the king might be inserted in his diploma as the only reason for his elevation. His Majesty not only complied, but directed that the Chancery should thenceforward follow this rule, as was anciently the practice under the sovereigns of the family of Vasa, till the reign of Christina."

I have not seen any of these ancient diplomas of Swedish nobility, and I know not whether the facts they exhibited as the reasons operating upon the sovereign were specific and detailed: but whatever were the nature of this certificate, it

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In England, the remuneratory branch of arbitrary power has begun to be pruned. Except in particular cases, the king is not allowed to grant a pension exceeding £300 per annum, without the consent of parliament. Since the passing of the act containing this restriction, the candidates for pensions have been but few.

When M. Necker undertook the administration of the finances in France, the total of the acknowledged pensions, without reckoning the secret gratuities, which were very considerable, amounted to twenty-seven millions of livres. In England, where the national wealth was not less than in France, the pensions did not amount to the tenth part of this sum. It is thus that the difference between a limited and an absolute monarchy may be exhibited, even in figures.

In Ireland, the king, upon his sole authority, in 1783, created an order of knighthood; thus profiting by what remained of the fragments of arbitrary power. No blame was imputed to him for establishing this tax upon honour: had he levied a tax upon property, the nation might not have been so tractable. Those who hoped to share in the new treasure were careful not to raise an outcry against its establishment: those at whose expense this treasure was established, did not understand this piece of finesse; they opened their eyes widely, but comprehended nothing. The measure could not have been better justified by circumstances. Every day the crown found itself stripped of some prerogative, justly or unjustly the subject of envy; it was therefore high time to avail itself of the small number of those, in the exercise of which it was still tolerated. Become independent of Great Britain, the honour of the Irish nation seemed to require a decoration of this kind: for what is a kingdom without an order of knighthood?

To enter into the consideration of the details requisite for the establishment of a system of remuneratory procedure, comes not within the present part of our design: a very slight sketch of the leading principles on which it might be grounded, is the utmost that can here be given. The general idea would of course be taken from the system established in penal and civil cases. Between these systems, the most striking difference would, however, arise from the interest and wishes of the agent whose act might be the subject of investigation, with respect to the publicity of the act. In the one case, the consequences of such his act, in case it were proved, being pernicious to him, all his endeavour would be to keep it concealed: in the other, these consequences being beneficial, his endeavour would be to place it in the most conspicuous light imaginable. In the first case, his endeavours would be to delay the process, and if possible make it void: in the latter, to expedite it, and keep it valid.

The most striking point of coincidence is the occasion there is in both cases for two parties. In the civil branch, there can hardly be a deficiency in this respect; there being commonly two individuals whose interests are opposite, and known and felt to be so. But in the penal branch, in one very large division of it, there is naturally no such opposition; I mean, in that which concerns offences against the public only. Here, therefore, the law has been obliged to create such an opposition, and has accordingly created it by the establishment of a public prosecutor. In the remuneratory branch of procedure, there is a similar absence of natural opposition, and accordingly the grand *desideratum* is the appointment of an officer whose business it should be to contest on the part of the public, the title to whatever reward is proposed to be granted in this way. He might be entitled, for shortness, by some such name as that of Contestor-general. Without a prosecutor-general, in the large and important division of cases above mentioned, there would not, unless by accident — I mean, when an individual is engaged in the task of prosecution by public spirit, or what is much more natural, by private pique — be any suit instituted, any punishment inflicted. For want of a contestor-general, there is not, unless by a similar accident,* any check given to the injustice of unmerited remuneration.

Upon the whole, then, the penal and civil

served as a token of respect to public opinion, and a means of preserving undiminished the value of titles of nobility. This usurpation was scarcely noticed amidst the great revolution which the king had just accomplished. In the career of arbitrary power, there are open conquests and clandestine acquisitions.

* I say by accident: for as in the case of offences against the public merely, accident will sometimes raise up a private prosecutor in the person of a chance individual, so in matters of remunerative procedure, will accident sometimes raise up a contestor in the person of some member of the body by whose appointment the reward is bestowed. This supposes that the reward is to be in the appointment of a body; so that if it be at the appointment of a single person, the chance of contestation is altogether wanting. This chance will of course be the greater, the more numerous that body: but if the body be very small, especially if it be composed without any mixture of different interests and partialities, and its deliberations held in secret, it will amount to nothing. If the business be confined to three, or four, or half-a-dozen, who are intimately connected, the bargain is soon made: "You serve my friend, I serve yours." Even if the assembly be ever so numerous, the chance of contestation is but a precarious one. The task is at any rate an invidious task: he must be a man of more than common public spirit, added to more than common courage, who, unprompted by party jealousy and uncompelled by office, will undertake it: nor

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branches of procedure, but particularly the penal, may in all cases serve either as the models, or, if the term may be admitted, as the *anti-models* of the remuneratory branch of procedure

CHAPTER XIII.

REWARDS TO INFORMERS.

The execution of a law cannot be enforced, unless the violation of it be denounced; the assistance of the informer is therefore altogether as necessary and as meritorious as that of the judge.

We have already had occasion to remark, that with respect to public offences, where no one individual more than another is interested in their prosecution, it has been found necessary to create a sort of magistrate, an accuser-general, to carry on such prosecutions in virtue of his office; but it is indispensably necessary that offences should be denounced to him, before he can begin to act.

In a well-ordered community, it would be the duty of every individual possessing evidence of the commission of a crime, to denounce the criminal to the tribunals; and such individual would be disposed so to do. In most countries, however, men in general are desirous of withdrawing from the performance of this duty. Some refuse to perform it from mistaken notions of pity towards the delinquent; others, because they disapprove of some part of the law; others, from the fear of making enemies; many from indolence; almost all from a disinclination to submit to that loss which would arise from the interruption of their ordinary occupations.

In these countries, therefore, it has been found necessary to offer pecuniary rewards to informers.

So far as my knowledge extends, governments have never been advised to discontinue this practice. It is supported by authority, but it is condemned by public opinion: mercenary informations are considered disgraceful; salaried informers, odious. Hence it results, that the reward offered by the law does not possess all its nominal value; the disgrace attached to the service is a drawback upon its amount. The individual is rewarded by the state, and punished by the moral sanction.

Let us examine the usual objections made against mercenary informations.

1. *It is odious* (it is said) *to profit by the evil we have caused to others.*

This objection is founded upon a feeling of improper commiseration for the offender; since pity towards the guilty is cruelty towards the innocent. The reward paid to the informer has for its object, the service he has performed; in this respect, he is upon a level with the judge who is paid for passing sentence. The informer is a servant of the government, employed in opposing the internal enemies of the state, as the soldier is a servant employed in opposing its external foes.

2. *It introduces into society a system of espionage.*

To the word espionage, a stigma is attached: let us substitute the word *inspection*, which is unconnected with the same prejudices. If this inspection consist in the maintenance of an oppressive system of police, which subjects innocent actions to punishment, which condemns secretly and arbitrarily, it is natural that such a system and its agents should become odious. But if this inspection consist in the maintenance of a system of police, for the preservation of the public tranquillity and the execution of good laws, all its inspectors, and all its guardians, act a useful and salutary part: it is the vicious only who will have reason to complain; it will be formidable to them alone.

3. Pecuniary rewards may induce false witnesses to conspire against the innocent.

If we suppose a public and well-organized system of procedure, in which the innocent are not deprived of any means of defence, the danger resulting from conspiracy will appear but small. Besides the prodigious difficulty of inventing a coherent tale capable of enduring a rigorous examination, there is no comparison between the reward offered by the law, and the risk to which false witnesses are exposed. Mercenary witnesses also are exactly those who excite the greatest distrust in the mind of a judge, and if they are the only witnesses, a suspicion of conspiracy instantly presents itself, and becomes a protection to the accused.

These objections are urged in justification of the prejudice which exists; but the prejudice itself has been produced by other causes; and those causes are specious. The first, with respect to the educated classes of society, is a prejudice drawn from history, especially from that of the Roman emperors. The word informer at once recalls to the mind those detestable miscreants, the horror of all ages, whom even the pencil of Tacitus has failed to cover with all the ignominy they deserve: but these informers were not the executors of the law; they were the executors of the personal and lawless vengeance of the sovereign.

The second and most general cause of this prejudice is founded upon the employment given to informers by religious intolerance. In the ages of ignorance and bigotry, barba-

have instances been wanting when the most numerous and discordant assemblies have concurred unanimously in the vote of rewards, which the majority have been known individually to disapprove.

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rous laws having been enacted against those who did not profess the dominant religion, informers were then considered as zealous and orthodox believers; but in proportion to the increase of knowledge, the manners of men have been softened, and these laws having become odious, the informers, without whose services they would have fallen into disuse, partook of the hatred which the laws themselves inspired. It was an injustice in respect to them, but a salutary effect resulted from it, to the classes exposed to oppression.

These cases of tyranny excepted, the prejudice which condemns mercenary informers is an evil. It is a consequence of the inattention of the public to their true interests, and of the general ignorance in matters of legislation. Instead of acting in consonance with the dictates of the principle of utility, people in general have blindly abandoned themselves to the guidance of sympathy and antipathy — of sympathy in favour of those who injure — of antipathy to those who render them essential service. If an informer deserves to be hated, a judge deserves to be abhorred.

This prejudice also partly springs from a confusion of ideas. No distinction is made between the judicial and the private informer; between the man who denounces a crime in a court of justice, and he who secretly insinuates accusations against his enemies; between the man who affords to the accused an opportunity of defending himself, and he who imposes the condition of silence with respect to his perfidious reports. Clandestine accusations are justly considered as the bane of society: they destroy confidence, and produce irremediable evils; but they have nothing in common with judicial accusations.

It is extremely difficult to eradicate prejudices so deeply rooted and natural. From necessity, the practice of paying public informers continues to be in use; but the character of an informer is still regarded as disgraceful, and by some strange fatality the judges make no efforts to enlighten the public mind on this subject, and to protect this useful and even necessary class of men from the rigour of public opinion. They ought not to suffer the eloquence of the bar to insult before their faces these necessary assistants in the administration of justice. The conduct of the English law towards informers furnishes a curious but deplorable instance of human frailty. It employs them, oftentimes deceives them, and always holds them up to contempt.

It is time for lawgivers at least to wean themselves from these schoolboy prejudices, which can consist only with a gross inattention to the interests of the public, joined to a gross ignorance of the principles of human nature. They should settle with themselves once for all what it is they would have: they should strike, somehow or other, a balance between the benefit expected from the effects of a law, and the inconveniences, or supposed inconveniences, inseparable from its execution. If the inconveniences preponderate, let there be an end of the law; if the benefits, let there be an end of all obstacles which an aversion to the necessary instruments on which its efficacy depends, would oppose to its execution.

CHAPTER XIV.

REWARDS TO ACCOMPLICES.

AMONG informers, criminals who denounce their accomplices have been distinguished from others, and the offer of pardon or rewards to induce them thus to act, has been condemned as altogether improper. It must be acknowledged, that so long as there is any other means of obtaining the conviction of a criminal without thus rewarding an accomplice, this method is bad; the impunity necessarily accompanying it is an evil. But if there be no other means, this method is good; since the impunity of a single criminal is a less evil than the impunity of many.

In relation, however, to weighty and serious crimes, no such rewards can with propriety be appointed by a general law. A general law offering pardon and reward to the criminal who informed against his accomplices, would be an invitation to the commission of all sorts of crimes: it would be as though the legislator had said, "Among a multitude of criminals, the most wicked shall not only be unpunished but rewarded." A man shall lay plans for the commission of a crime — shall engage accomplices with the intention of betraying them: to the natural profits of the crime, such a law would add the reward bestowed upon him as an informer. It is what has often happened under English law. It is one of the fruits of the maxim which prohibits the examination of suspected persons, respecting facts which may tend to criminate themselves. It is, however, criminals who *can always* furnish, and who *often can alone* furnish, the light necessary for the guidance of justice. But the examination of suspected persons being forbidden as a means of obtaining intelligence, there remains only the method of reward.

But when the reward, instead of being bestowed in virtue of a general law, is left to the discretion of the judge, and offered only when necessary, this inconvenience does not exist. Advantageous crimes can no longer be committed with security. Recourse being had to this costly method only when all other methods fail, there will always be a longer or shorter interval, during which every cri-

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minal will feel himself exposed to the punishment denounced against his crimes. The employment of reward in this manner having become usual, will exercise upon the security of criminals the effect of a general law: it might even be prescribed by such a law. This method would then possess all the advantages of an unconditional law, without its inconveniences.

Beccaria has condemned, without exception, every reward offered to accomplices. As the foundation of his opinion, he produces only a confused sentiment of disapprobation attached to the words "*treason* and *faithlessness*."

Voluntary conventions among men are generally useful to society. It would be in most cases productive of evil, were they not considered binding. Infamy has therefore become constantly attached to the terms *treason* and *faithlessness*. The acts, however, to which these terms are applied, are only pernicious in as far as the contracts of which they are violations are at least innocent. To render the security of society (which crimes, were they to remain unpunished, would destroy) subordinate to the accomplishment of all manner of engagements, would be to render the end subordinate to the means. What would become of society, were it once established as a principle, that the commission of a crime became a duty if once it had been promised? That promises ought to be performed, is a maxim which, without a limitation excepting those the performance of which would be pernicious to society, ought to have place neither in laws nor in morals. It is doubtful which would be most injurious — the non-performance of every promise, or the performance of all. Far from being a greater evil than that to which it is opposed, it would be difficult to show that the non-performance of criminal engagements is productive of any evil. From the performance of such an engagement, an unfavourable judgment only can be formed of the character of the party: how can a similar judgment be formed from its violation? Because he has repented of having committed or been willing to commit an action injurious to society, and which he knew to be so, does it follow that he will fail to perform actions which he knows to be innocent and useful?

From the violation of engagements among criminals, what evil can be apprehended? — That unanimity shall be wanting among them? — that their enterprises shall be unsuccessful? — that their associations shall be dissolved? It is proverbially said, "there is honour among theives." The honour which cements their conspiracies is the pest of society. Why should we not seek to inspire them with the highest degree of distrust toward each other? — why should we not arm them against each other, and make them fear lest they should find an informer in every accomplice? Wherefore should we not seek to fill them with a desire to inform against and mutually to destroy each other; so that each one, uneasy and trembling in the midst of his fellows, should fear his companions as much as his judges, nor be able to hope for security but in the renunciation of his crimes? This is exactly what the consideration of the public welfare would lead us to wish; and if we are to be turned aside from the care of this object by regard to the fidelity of thieves and murderers to their engagements, for a still stronger reason, from humanity, ought we to abstain from punishing their crimes.

Beccaria, upon just ground, condemns the sovereigns and judges, who after having enticed an offender to become an informer, afterwards violate their promise, and render it illusory. In this case we need not fear to give vent to the feelings of horror and indignation which so mischievous a proceeding inspires. It is mischievous in the highest possible degree. It destroys all future confidence in similar offers, and renders powerless this most necessary instrument. It cements, instead of weakening, the union of criminals among themselves; and causes government itself to appear as the guardian of their society, by adding mockery to the rigour of the law, by punishing the individual who has confided in its promises.

"But," says Beccaria, "*society authorizes treason, detested even by criminals among themselves.*" We have already seen what is to be understood by this treason. It is natural to criminals to detest it — it is their ruin: it ought to be approved by honest men — it is their safeguard. *It will introduce crimes of cowardice and baseness.* No: it will introduce acts of prudence, of penitence, and of public utility; it will operate as an antidote to all crimes. *These pretended crimes of cowardice are more injurious to a nation than the crimes of courage.* The truth is exactly the reverse: which produce most alarm in society, privately stealing and swindling on the one side, or highway robbery and murder on the other? *The tribunal which employs this expedient, discovers its uncertainty.* It discovers that it can know nothing without having learnt it. By what means can a judge attain to certainty without witnesses? In what country is it customary for criminals to make the judges the confidants of their misdeeds and their plans? *The law exhibits its feebleness, in imploring the assistance even of him who has broken it.* The law seeks the offender who flies from it: if the means employed for his discovery are effectual, it only exhibits its wisdom

But if rewards are to be bestowed upon criminals who denounce their accomplices, Beccaria desires that it may be in virtue of

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"a general law, which should promise impunity to every accomplice who discovers a crime, rather than by a particular declaration in each particular case." The reason he assigns is, that "such a law would prevent the combination of malefactors, by inspiring each of them with the fear of exposing himself alone, to danger, and that it would not serve to give that boldness to the wicked, who see that there are some cases in which their services are required." But we have already observed, that the particular declaration equally serves to prevent this combination, and that it is the general law which tends to give boldness to the wicked, and even creates the belief that justice cannot be executed without them.

"A law of this nature," adds Beccaria, "ought to join to impunity the banishment of the informer." A condition of this nature could only serve to render the law inefficacious in a variety of cases, and also contains a contradiction in terms. A law joining banishment to impunity! Is not banishment a punishment?*

CHAPTER XV.

COMPETITION AS TO REWARDS.

WHEN a portion of the matter of reward is allotted for the purchase of services, ought the liberty of competition to be admitted? — in any, and what cases? — what is the general rule, and what are the exceptions? — in the case of what species of service? — for what species of reward?

If popular opinion be allowed to determine, the question concerning the general rule is already answered. In all cases in which no particular reason can be given to the contrary, the liberty of competition ought to be admitted upon the largest scale. Yet to this decision of the public, the practice of nations, that is, of those who bear the sway in nations, is by no means uniformly conformable: there are privileges and there are exclusions — pursuits open to one set, closed to another set of men: all governments have been more or less infected with that intermeddling disposition, which believes it can give perfection to particular species of service, by appropriating its exercise exclusively to particular individuals.

That there may be cases fit to be excepted out of the above general rule, is allowed: but before we come to the consideration of the exceptions, let us see how the matter stands upon principle — whether the people are most right, or their rulers.

And in the first place, by way of illustration, let us stop a moment to examine the connexion there is upon this occasion between reward and punishment. Let us suppose, apprehensions are entertained of the prevalence of murder and incendiarism. Against a particular person the suspicions are stronger than against any one else. There is as yet no law against either of those offences. The sovereign, intending to do his utmost to guard the state against those calamities, sends for the suspected person, and prohibits him from committing any such crimes, under such penalties as he thinks proper: for the suspected person, observe, and for him only; there being as yet no general law prohibiting such enormities, and everybody else being left at perfect liberty. If it were possible that any such incident could have happened within time of history, should not we pronounce at once, that either the nation could not yet have emerged from a state of the profoundest barbarism, or else that the sovereign so acting could not have been in his right mind? Such, however, is the exact counterpart of the policy of him, who wanting a service to be performed of such a nature as that, for aught he can be certain, there are several competent to perform it — some better than others, and each man, according to the motives that are given him, better than himself — commits the business to one, in exclusion of the rest.

If penal laws must be applicable to all, that there may be a chance of preventing all offences, the offer of reward ought to be general, that there may be a chance of obtaining all services, and of obtaining the best.

If we inquire in detail for the reasons why competition for reward, and for everything else which can be bestowed in the way of producing service, should be as open and as free as possible, the question may be considered in two points of view: — first, as it

* To the edition of Beccaria published at Paris in 1797, are added some notes by Diderot: unfortunately, they are short and few. I translate those which relate to the present chapter: —

"The errors of courts of justice and the feebleness of the law, even when crimes are known to have been committed, are matters of public notoriety. It is in vain to endeavour to conceal them; there is nothing, therefore, to counterbalance the advantage of disseminating distrust among malefactors, and rendering them suspected and formidable to one another, and the causing them without ceasing to dread in their accomplices so many accusers. This can only tend to make the wicked cowards, and everything which renders them less daring is useful."

"The delicacy of the author exhibits a noble and generous heart: but human morality, of which laws form the basis, is directed to the maintenance of public order, and cannot admit among the number of its virtues the fidelity of malefactors among themselves, that they may disturb that order, and violate the laws with greater security. In open war, deserters are received: with greater reason ought they to be received in a war carried on amidst silence and darkness, and whose operations consist of snares and treachery."

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concerns the interests of those for whose sake the service wanted is to be performed; secondly, as it concerns the interests of those by whom the service might come to be performed.

With regard to the former set of interests, it has already been observed,* as a reason for the employment of reward as a fitter instrument than punishment for attaining a given degree of excellence, the idea of which has already been conceived by the person who wishes it to be attained, — that the chance is greater when reward is employed as the incitement, than when use is made of punishment; because punishment can only operate upon a few selected individuals, and should they be unequal to the task, would be altogether employed in vain. Whatever number you select, you forego all the chance which you might have of the service being performed by any one else. The case is equally the same when rewards are offered to a selected few. Allowing the liberty of competition, you may propose rewards to any number without expense—you pay it but to one: you do not pay it till the service is performed; and the chance of its being performed is in proportion to the number of persons to whom it is proposed.

Another advantage which reward has over punishment, as we have seen, is, that by means of the former, the value of the service may be brought to an indefinitely high degree of perfection. But this can only be effected by means of a free competition. In this way, and this only, can individuals be led to exert their faculties. Were the reward proposed to one only, having rendered the degree of service sufficient to entitle him to the reward, he would stop there: to make the exertions necessary to carry it to any higher degree of perfection, would be to trouble himself to no purpose. But let a reward be offered to that one of two competitors, for example, who best performs the service: unless either of them know exactly the degree of skill possessed by the other, and know it to be clearly inferior to his own, each will exert himself to his utmost, since the more perfect he makes his work, the better chance has he of gaining the reward. The matter is so ordered, that for every part of the greatest degree of service he can possibly find means to render, there will be a motive to induce him to render it. The same reasoning may be applied to any other number of competitors; and the chance of perfection will be increased, if the faculties of the competitors are equal in proportion to their number.

Should he who has the disposal of the reward assert — "I am acquainted with an individual more competent than any other to perform the service in question, and with whom no one can be placed in competition," — his assertion is exposed to this dilemma: Upon a fair trial of skill, either this person will stand first, or he will not: if he stand first, the competition is not to his prejudice, but redounds to his honour; if another excel him, the advantage of a free competition is proved. Partiality is either mischievous or unnecessary.

We next consider the question as it affects the interest of those who might be admitted as competitors.

Reward in its own nature *is a good:* all competitors think so, and that a balance of good remains even after deducting the evil of that labour, whatever it be, which is expended in the performance of the service, or they would not be competitors. He who has the disposal of the reward thinks so, or he would neither offer it, nor be so anxious as he sometimes is to secure it for those to whom he wishes to give a preference. But when there is no special reason to the contrary, why should not all the members of a state have a chance of obtaining the goods to be distributed in that state? To exclude any man from any chance he might have of bettering himself, is at best a hardship: if no special reason can be given for it, it is injustice, and one of those species of injustice which, if administered on pretence of delinquency, would openly bear the name of punishment.

It may be objected, that if a free competition were allowed, "the number of competitors would be very great, while the reward being confined to one, or to a very small number, one only will be paid for his labour; the lot of the rest would be lost labour and disappointment: that the public would be losers, by their labours being diverted from services of greater utility, and that the service would, without this competition, be performed in a sufficient degree of perfection, or if performed in any higher degree, would be of no further use."

The following considerations may serve as a reply to these objections. Where there is nothing more than the mere loss of labour to those who can afford to lose it, or of any thing else to those who can afford to part with it, the possible amount of mischief, be it what it may, can afford no sufficient reason for narrowing competition. If there be the pain of disappointment after trial, there has been the pleasure of expectation before trial; and the latter, there is reason to believe, is upon an average much greater than the former. The pleasure is of longer continuance, it fills a larger space in the mind; and the larger, the longer it continues. The pain of disappointment comes on in a moment, and gives place to the first dawning of a new hope, or is driven out by other cares. If it be true, that the principal part of happiness consists in hope, and that but few of our

* Book I. Chap. VII. *antea*, p. 204.

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hopes are completely realized, it would be necessary, that men might be saved from disappointment, to shut them out from joy.

It may further be observed, that the liberty of competition seldom includes so many as, if considered with regard to the particular nature of the service, it would seem to include. Where it is not restrained by institution, it is often restrained by nature, and that sometimes within very narrow bounds. Services depending on opportunity, are confined to those to whom fortune shall have given the opportunity;—services depending on science or on art, are confined to those whom education and practice have familiarized with the science or the art;—services depending on station, are confined to one, or to the few, if there be more than one, who at the time in question are invested with that station. Thus the objection derived from the too great number of competitors is almost always without foundation.

It also often happens, that, independently of the reward given to the successful candidate, the service even of the unsuccessful pays itself. This is more particularly apt to be the case with regard to services of indefinite excellence which depend on skill. Some develope their talents—others obtain notoriety; one discourse obtains the reward—twenty candidates have improved their minds in endeavouring to obtain it. The athletic exercises, which on such a vast variety of occasions were celebrated throughout ancient Greece, seem to have been open to all comers: it was but one at each game that could obtain the prize; but even the unsuccessful combatants found a sort of subordinate advantage in the reputation of having contended, and in the advances made by them in those energies, which at that time of day gave distinguished lustre to every one who excelled in them.

It may even happen, that the service of the successful shall be no object, and that the services looked to on the part of him who institutes the reward shall be those which are performed by the unsuccessful. The Grecian games just mentioned, may be taken as an example. The strength of the successful combatant was no sensible advantage to the country: the object aimed at was the encouragement of personal prowess and skill. In this country, the prizes given at horse-races have a similar sort of object. From the few horses who win, the public may reap no particular advantage; but the horses which are beaten, or never contend for the prize, are improved by the emulation to which it has given birth.

By the English Government, very ample rewards are offered to him who shall discover the most perfect and practicable mode of ascertaining a ship's longitude at sea. One effect of this reward is to divert from their employments a multitude of artists and students in various branches of physical science, of whom a few only can have any recompense for their expense and labour. To pay all that would try, might probably be impracticable; but the benefit of the service appears to counterbalance this inconvenience; and in point of fact, the persons who can suppose themselves qualified to contend in such a race are so few, that this inconvenience can scarcely be very considerable. Were the same reward to be given for running, boxing, or wrestling, the common businesses of life would be deserted, and all the world would become runners, boxers, and wrestlers.

Amongst the Athenians, rewards not vastly inferior, considering the difference in the value of money and the common rate of living, were actually given to such athletic exercises. But the Athenians were as much in the right so to do, as we should be in the wrong to imitate them. In those days, when success in war depended almost entirely upon bodily address and vigour, encouraging the performance of these exercises was disciplining an army; and the national wealth could suffer little, since the labours of agriculture were chiefly carried on by slaves.

The advantages resulting from the most unlimited freedom of competition therefore are—1. Chance of success increased according to the number of competitors; 2. Chance of the highest success increased by invigorating the increased effort of each competitor; 3. Equality established; 4. Number of works multiplied; 5. Latent talents developed.

Application of the above principle.

The cases to which this principle may be applied are much more extensive than might at first view be imagined: it covers a great part of the field of legislation; it may be applied to ecclesiastical, to fiscal, to administrative, and to constitutional laws.

This rule is in direct opposition to the fundamental principle of Hindoo legislation. In that country, every man belongs to a caste from which he cannot separate himself. To each caste belongs the exercise of certain professions: there is a caste of learned men, a caste of warriors, and a caste of labourers. Emulation is thus reduced within the narrowest bounds, and the energies of the people are stifled.

This principle is opposed to those ecclesiastical regulations, by which all who refuse to sign certain articles of belief, or refuse to pronounce a certain number of words concerning theological subjects, are excluded from certain professions. The greater the number of individuals thus excluded, the greater the loss sustained by the diminution of competition in the performance of those services.

This principle is in direct contradiction to

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a multitude of fiscal and administrative laws, establishing exclusive privileges in favour of certain branches of commerce and trade; fixing the price of commodities, and the places at which they are to be bought and sold; prohibiting the entry or the exit of various productions of agriculture or of manufactures. These are so many expedients limiting competition, and are injurious to the national wealth.

The father of political economy has from this principle in a manner created a new science: the application he has made of it to the laws relating to trade, has nearly exhausted the subject.*

By two opposite competitions, prices are fixed. Competition among the purchasers secures to the producers a sufficient compensation for the outlay of their capital and labour: competition among the sellers, serving as a counterpoise to the other, produces a cheap market, and reduces the prices of commodities to the lowest sum for which it is worth while to produce them. The difference between a low price and a high price is a reward offered to the purchaser by one seller for the service he will render to him, by granting what remains to be gained, to him instead of to his competitor who requires more.

In all trades, and in all arts, competition secures to the public, not only the lowest price but the best work. Whatever degree of superiority is possessed by one commodity over another of the same description, meets with its reward either in the quantity sold, or in the price at which it is sold.

As to stores of every description of which the public stands in need, why is not the competition left open to all who may choose to undertake the supply? It is not difficult to find the determining reason: it is more convenient to serve a friend, a dependent, or a partizan, than a person unknown, or perhaps an enemy. But this is not an avowable reason: for the public, some other must be sought. Open competition would, it is said, produce a multitude of rash contractors. The terms in appearance most advantageous to government would commonly be offered by some rash adventurer, who, in the end, would be found unable to fulfil his engagements. When the time came for the performance of his part of the contract, the stores in question would not be provided, and the service would suffer irreparable injury. It is important that the men with whom we deal should be well known. In some cases, these reasons may not be without foundation, but they are most frequently illusory.†

The very nature of the reward may sometimes render it necessary to depart from the system of competition. It is not every office that can be offered to every one disposed to undertake it. Ought the education of a prince to be offered to him who writes the best treatise upon that education? No: such an office requires qualities and virtues, and particularly a knowledge of the world, which might not be possessed by the philosopher who had resolved the problem.

Ought the office of master of the mint to be offered to any one who produces the best die? No: this important duty requires a probity, an exactness, a habit of regularity, which has no connexion with manual skill. This is a reason, and the only reason, for not offering such offices to all the world; but it is no reason for not attaching to this service another reward, to which all the world might aspire.

Some services, which are not directly susceptible of open competition, are so indirectly; that is, by making the competition consist in the performance of some preliminary service, the execution of which may serve as a test of a man's ability to perform the principal service. This is what is done in the case of extensive architectural works, when artists are invited to give in their plans and their models: this is all that the nature of the service allows of.‡

* Wealth of Nations.

† The following is the general outline of an arrangement by which all the above difficulties would be effectually removed:—Unlimited competition; with power to the minister, or to any competent authority, to reject the offer which ought according to the general rule to be accepted: power also to the offerer to call upon the minister, or competent authority, to assign their reasons for such rejection. When all this is done publicly, no attempt would be made to reject the offer of a man, who, together with his sureties, was known to be perfectly responsible.

A praise to which one of the most *celebrated* ministers in England is justly entitled, and about which there is no difference of opinion, is the having, with more consistency than any of his predecessors, followed this principle. Mr. Pitt divested himself of this source of influence, so dear to ministers, and opened a free competition for all contracts and all loans. It is unnecessary to point out the advantages resulting from this just and liberal policy: they are known to all the world; and the example set by him has been a law to his successors.

‡ Some years ago, it was thought desirable to have a general Index made to the Journals of the House of Commons: for if it be not yet desirable to have the laws themselves methodised, it has however been thought desirable to methodise the history of the proceedings of this branch of the legislature. It was an undertaking of very considerable difficulty, both in consideration of its magnitude, and the variety of matter it embraced. How were fit persons to be selected for it? Competition, in the usual mode, could not have been employed. The legislature could not say to men of letters,—Work, and the best workman shall be rewarded. Who, uncertain of being paid for it, would have devoted his life to so repulsive an employment? The course taken was this:—the work was put into the hands of four men of letters, selected one knows not how, nor by whom, nor why. The work was divided amongst them, in such sort that each of them received to his

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When, some years ago, it was designed to erect, in the neighbourhood of London, at the public expense, a Penitentiary House, the mode of unlimited competition was adopted, in order to obtain plans for it. The superintendents received sixty-five plans, from among which they had an opportunity of making a selection, instead of the one which they would have received, had the system of favouritism been pursued. If, without reward, a plan superior to the best of those thus obtained has since been devised, it may be attributed to the share which chance has in every new invention: the offer of a reward may accelerate the developement of new ideas, without enabling an individual to complete the arrangement of his plans at a given moment.

When the British parliament offered a reward of £20,000 for the discovery of a mode of finding the longitude, they were not guilty of the absurdity of confining the competition to the professors of natural philosophy and astronomy at Oxford and Cambridge. To resolve the problem of the best system of legislation, is more important and more difficult. Why, in mixed governments, has it been hitherto confined to the members of the legislative body, and in monarchies, to the chancellor? The determining reason is abundantly clear: Those who are in possession of the power — those to whom it belongs to propose this problem, are ashamed to make a public avowal of their own incapacity to solve it; they carefully avoid all acknowledgments of their own incapacity or indolence; they are willing that their labours should be rendered as little burdensome as possible, by following the ordinary routine, and not that they should be increased by the exhibition of the necessity of reform. In a word, they desire not to be advised, but to be obeyed. While subject to the influence of such circumstances, it can be considered no matter of surprise that they should, as far as possible, have made the science of legislation an exclusive monopoly. The interests of human nature cry aloud against this contemptible jealousy. The problem of the best system of laws ought to be proposed to the whole world: it belongs to the whole world to solve it.

Frederic the Great twice attempted to make a general reform in the laws of his kingdom: both times he applied to a single chancellor. The first of them, too contented with himself to suspect he could stand in need of assistance from others, produced a work the most insignificant of any which has appeared.* The second, M. Von Carmer, after having completed his labours, acted very differently, and much better: before it received the authority of a law, he presented it to the public, with an invitation to learned men to communicate to him their observations upon it; seconding his invitations by the offer of rewards. It is with regret that I am constrained to ask, why did not he, who had in this respect thus far surpassed all his predecessors, act still more nobly? Why only ask for criticism upon a given work? — why not ask for the work itself? Why limit the invitation to Germans alone, as though there were no genius out of Germany? — why limit the reward to a sum below the price of those snuff-boxes which are presented to a foreign minister, for the service he performs in departing when he is recalled. The richest diamond in his master's crown would not have been too great a reward for him who should thus have given to all the others a new and before-unknown splendour.

On different occasions, public-spirited individuals and societies have endeavoured to supply, from their slender resources, the neglect of governments, and have offered larger rewards than the chancellor of the Great Frederic. That which they could not offer, and which it did not depend upon them to offer, was the reward which the minds best adapted for the accomplishment of such an undertaking would esteem above every other: I mean, the assurance that their labours would be judged by those who could give them authority — who could make them useful.

In conclusion, I do not say, that with regard to certain services, sufficient reasons may not be found for altogether excluding competition, but that in every such case these reasons ought to be ready to be rendered, otherwise it ought to be lawful to conclude that they do not exist.†

share such and so many volumes, according as he was most in favour. The result has been four indexes instead of one, all of them materially varying in method and completeness, and rendering unavoidable the great inconvenience of consulting four volumes instead of one. If a plan analogous to that employed in the case of architectural works had been adopted, the course taken would have been to advertise a premium for the best essay on the art of index-making, and particularly as applied to the work in question. As a still further security, an index to one volume might have been required by way of specimen; and to him who gave the greatest satisfaction upon both these points, the conduct of the work should have been committed.

* Some extracts from it may be seen in the *Manual of Political Economy.*

† With reference to constitutional law, hereditary succession to the throne is established, to prevent the competition of many pretenders. It is the principal exception to the principle, and the most easily justified.

Another species of inheritance, of which the Egyptians had given an example, and which the Indians have adopted, has found admirers even in our days. I refer to hereditary professions in particular families, where they can neither have two, nor change their first. "Par ce moyen," says Bossuet, "tous les arts venaient à leur perfection; on faisait mieux ce qu'on avait toujours vu faire, et à quoi l'on s'était uniquement exercé dès son enfance."—*Discours sur l'Histoire Universelle.*

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CHAPTER XVI.

REWARDS FOR VIRTUE.

Beccaria accuses modern legislators of indifference to this subject. "Punishments," says he, "and, in many instances, unduly severe punishments, are provided for crimes; for virtue there are no rewards." These complaints, repeated by a multitude of writers, are matter of common-place declamation.

So long as they are confined to general terms, the subject presents no difficulty; — but when an attempt is made to remove the ground of complaint, and to frame a code of remuneratory laws for virtue, how great is the difference between what has been asserted to be desirable, and what is possible!

Virtue is sometimes considered as an act, sometimes as a disposition: when it is exhibited by a positive act, it confers a service; when it is considered as a disposition, it is a chance of services. Apart from this notion of service, it is impossible to tell wherein virtue consists. To form clear ideas concerning it, it must altogether be referred to the principle of utility: utility is its *object*, as well as its *motive*.

After having thus far spoken of *services* to be rewarded — that is, of manifest and public acts which fall not within the line of ordinary actions — it remains to be shown, in relation to *virtue*, — 1. What cannot be accomplished by general rewards; 2. What it is possible to accomplish, either by particular institution, or occasional reward.*

1. We may observe, in the first place, that those civil virtues, which are most important to the welfare of society, and to the preservation of the human race, do not consist in striking exploits, which carry their own proof with them, but in a train of daily actions, in an uniform and steady course of conduct, resulting from the habitual disposition of the mind. Hence it is precisely because these virtues are connected with the whole course of our existence, that they are incapable of being made the objects of the rewards of institution. It is impossible to know what particular fact to select, at what period to require the proof, to what particular circumstance to attach the distinction of reward.

2. Add to these difficulties, that of finding a suitable reward which shall be agreeable to those for whom it is designed. The modesty and delicacy of virtue would be wounded by the formalities necessary to the public proof of its existence. It is fostered by, and perhaps depends upon esteem: but this is a secret which it seeks to hide from itself, and those prizes for virtue which seem to suppose that conscience is bankrupt, would not be accepted by the rich, nor even sought after by the most worthy among the poor.

3. Every virtue produces advantages which are peculiar to itself: probity inspires confidence in all the relations of life; industry leads on to independence and wealth; benevolence is the source of kindly affections; — and though these advantages are not always reaped, they generally follow in the natural course of events. Their effect is much more steady and certain than that of factitious reward, which is necessarily subject to many imperfections.

In the reign of Louis XIV. a treatise was published — "On the *Falsity* of Human Virtues." What is singular, and what the author probably never suspected is, that by some slight alterations it would be easy to convert this work into a treatise *on their reality*. The author appears to have considered them as false, because they were founded upon reciprocal interest — because their object is happiness, esteem, security, and the peaceable enjoyment of life — because men in their mutual intercourse settle with each other for their reciprocal services. But without these felicitous effects, what would virtue be? In what consists its *reality*? What would it have to recommend it? How would it be distinguished from vice? This basis of interest, which to this author appears to have rendered it *false*, is precisely that which gives it a true and solid, and we may add, an immutable existence; for no other source of happiness can be imagined.†

But if the most important class of virtues are already provided with sufficient motives to lead to their performance, either in the sufferings they prevent, or in the advantages to which they give birth, is it not superfluous to add factitious motives? The interference

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Robertson, in his *Historical Researches respecting India*, has warmly approved the institution of castes, and hereditary professions. He allows, however, that this system may hinder the exertions of genius. "But the arrangements of civil government," says he, "are made, not for what is extraordinary, but for what is common; not for the few, but for the many."—*Appendix.*

If we look at a single art in Europe — that of painting, for instance—its history will show, that very few artists have been born in a painting room. Among a hundred of the most celebrated painters, it will be found that Raphael alone had a father who handled the pencil. "*Invito patre sidera verso*," was the device of the illustrious Bernouilli, who could only study astronomy in secret, and in opposition to the authority of his father.—*Dumont.*

* This will partly form an application of the principles laid down in Chapter VII. *Punition and Remuneration—their relations.* Mr. Bentham, apparently not having believed it necessary to enter into this detail, I have attempted, by this chapter, to supply this omission, if it were one.—*Note by Dumont.*

† The writer above alluded to, like all ascetics unskilful in reasoning, injures the religion it was his object to serve. How strong an argument may we not derive from this coincidence between practical morality and happiness, in proof of design on the part of the supreme legislator!

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of legislators is useful only in supplying the deficiency of natural motives.

4. What would be our condition were things in a different state? — were it necessary to invite men to labour, honesty, benevolence, and all the duties of their several conditions, by means of factitious reward? Pecuniary rewards, it is evident, it would be impossible to bestow. Honour, it is true, remains; but how would it be practicable to create, in the shape of honour, a sufficient fund of reward for the generality of human actions? The value of these rewards consists in their rarity: so soon as they are common, their value is gone.

In this case, as in so many other cases, there is an analogy between rewards and punishments. It is an imperfection common to both these sanctions, that they are applicable to actions alone, and exercise only a distant and indirect influence upon the habits and dispositions which give a colour to the whole course of life. Thus, rewards cannot be instituted for parental kindness, conjugal fidelity, adherence to promises, veracity, gratitude, and pity: legal punishments cannot be assigned to ingratitude, hardness of heart, violations of friendly confidence, malice or envy, — in a word, to all those vicious dispositions which produce so much evil before they have broken out into those crimes which are cognizable before legal tribunals. The two systems are like imperfect scales, useful only for weighing bulky commodities; and as an individual, whose life has been less guilty than that of a man of a hard and false heart, is punished for a single theft, there is also often a necessity of rewarding a certain distinguished service, performed by a man who is otherwise little entitled to esteem.

Thus, in regard to the moral virtues which constitute the basis of daily conduct, there is no reward which can be applied to them by general institution. All that it is possible to do is limited to seizing upon those striking actions, readily susceptible of proof, which arise out of extraordinary circumstances, as opportunities of conferring occasional rewards.

Rewards of this nature cannot be bestowed periodically: the occasions for performing eminent services do not regularly recur. It is the action, and not the date in the almanack, which ought to occasion the reward. The French Academy annually bestowed a prize upon the individual who, among the indigent classes, had performed the most virtuous action. The judges had always one prize to bestow, and they had but one. They must occasionally have experienced regret at leaving unrewarded actions of merit equal to that which gained the reward, and sometimes at being obliged to reward an action of an ordinary description. Besides, by the periodical return of the distribution, this prize would soon be rendered an object of routine, and cease to attract attention.

The institution of *La Rosière de Salency* may be produced in answer to the above observations: but it should be remembered, that a village institution is of a different nature. The more limited a society, the more closely may its regulations be made to resemble those of domestic government; — in which, as we have already seen, reward may be applied to almost every purpose. It is thus that annual prizes may be established for agility, skill, strength — for every other quality which it may be desirable to encourage, and of which the rudiments always exist. There is not a village in Switzerland which does not distribute prizes of this nature for military exercises: it is an expedient for converting the duties and services of the citizens into *fêtes*. Geneva, whilst it was a republic, had its naval king — its king of the arquebuss — its commander of the bow — its king of the cannon. The conqueror, during the year of his reign, enjoyed certain privileges, little costly to the state; the public joy marked the return of these national exercises, which placed all the citizens under the eyes of their grateful country. *La Rosière de Salency*, designed to honour virtues which ought to be perpetuated and renewed from generation to generation, might have a periodical return, like the roses of summer.

The *Humane Society*, established in England for the purpose of affording assistance to persons in danger of drowning, and providing the means of restoration in cases of suspended animation, distributes prizes to those who have saved any individual from death. In this case, the reward is not, as in the French Academy, confined to the indigent class alone: men of the first rank would consider it an honour to receive a medal commemorative of so noble an action. Besides, the mode of conferring these rewards has not been dramatised; the retired habits of virtue have been consulted; there is no public exhibition to which it is dragged, to be confounded or humiliated. Greater *eclât* might, however, without adding to the theatrical effect, be given to these rewards, were an efficient report made of them to the king and both houses of parliament.

An institution of a similar nature, for the reward of services rendered in cases of fire, shipwreck, and all other possible accidents, would still further contribute to the cultivation of benevolence; and these noble actions, brought in the same manner under the eyes of the legislators, and inscribed in their journals, would acquire a publicity of much less importance to the honoured individual than to society in general.

Indeed, though the reward applies only to one particular action, the principal object designed is the cultivation of those dispositions which such actions indicate: and this can only be accomplished by the publicity

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which is given to the example, and the public esteem and honour in which it is held.

When, upon the site of the prison which had been the scene of an exalted instance of filial piety, the Romans erected a temple, they inculcated a noble lesson: they proclaimed their respect for one of the fundamental virtues of their republic.*

Independently of these eminently meritorious and always rare actions, governments might render *publicity* subservient to the perfection of a great variety of services, in the performance of which the regular discharge of duty is more important than the display of extraordinary virtues. This project might be realized by the formation of a comparative table of the subordinate administrations of cities, parishes, or counties. This table would require to be renewed at fixed periods, and might be made to show which districts were most exact in the payment of taxes — in which the fewest crimes had been committed — in which useful establishments had been formed — in which the most liberal exertions had been made for the relief of calamity — what hospitals had been conducted with the greatest economy, and had been most successful in the cure of diseases; † what tribunals had decided the greatest number of causes, and from which the smallest number of appeals had been made; in what instances efficacious precautions had been adopted for relieving any particular district from causes tending to render it unhealthy, — from mendicity, from smuggling, from vice, and from misery.

Such official reports, independently of their political utility to the government, would, without parade, produce all the good effects of reward — of that reward in honour which costs nothing to the country, and yet maintains all the moral energies in full activity. Every distinguished service might find a place in these annals; and the people, always prone to exaggerate the vigilance and means of information possessed by their governors, would soon be persuaded that a perpetual inspection was kept up, not only with respect to their faults, but also their meritorious actions.

This project is borrowed neither from the Republic of Plato, nor the Utopia of More. It is even inferior to what has in our time been carried into effect, in an empire composed of more than a hundred departments; ‡ in which tables, exhibiting in columns all the results of civil, economical, rural, and commercial administration, were formed with greater facility and promptitude than would have been experienced by any Russian noble, had he been desirous of obtaining from his superintendents an account of the state of his property.

If rewards were established for virtue, when exhibited by the indigent classes, it would be improper to seek for striking instances of its display, or to suppose that they are actuated by sentiments of vanity, which operate feebly upon men accustomed to dependence, and almost constantly employed in making provision for their daily wants. Institutions of this nature, suited to small communities, ought to be adapted to local circumstances and popular habits. In a village or a town, for instance, it might be proper to assign a distinguished place in the church for the old men: this distinction, united to a sentiment of religion, and granted with discretion, need bear no appearance of flattery, but might be a mark of respect towards old age, rendered honourable by the blameless life which had preceded it. There exist in England many charitable institutions for decayed tradesmen, in which their situation is much preferable to that of the inhabitants of poor-houses: they have their separate dwellings, their gardens, and a small pension. Those only whose conduct has been generally honourable being admitted to these asylums, the metal badge which is worn in some instances, so far from being considered as a disgrace, is regarded as a mark of honour.

Different agricultural societies bestow rewards upon servants who have lived during a certain number of years in the same place; this circumstance being with reason considered as a proof of fidelity and good conduct.

Some of these societies also give rewards to day-labourers who have brought up a certain number of children without having received assistance from their parishes. This is an encouragement to economy, and to all the virtuous habits which it implies: but as a means of remedying the inconveniences arising from the poor laws, its effect is extremely feeble.

In both these cases, the reward generally consists of money: but the money is con-

* Humilis in plebe et ideo ignobilis puerpera, supplicii causâ carcere inclusâ matre, cum impetrasset aditum, a janitore semper excussa, ne quid inferret cibi, deprehensa est uberibus suis alens eam. Quo miraculo matris salus donata filiæ pietati est, ambæque perpetuis alimentis: et locus ille eidem consecratus deæ, C. Quintio M. Acilio Coss. templo Pietatis extructo in illius carceris sede. — *Plin.* lib. vii. c. 36.

† In the report respecting l'Hotel Dieu, by Bailli, a table of the mortality in different hospitals is given, and the process of his calculations.

‡ I refer here to *L'Analyse des Procès-verbaux des Conseils de Départment;* a work in 4to, published in France in 1802. This work consisted of the answers to a series of questions, addressed to each department, by the minister of the interior.

These tables have been discontinued. Such is the fact. I do not endeavour to ascertain the cause.

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nected with honour; the notoriety given to the reward operates as a certificate in favour of the individual in his particular district.

By examining everything which has been done in this respect in Holland, Switzerland, England, and elsewhere, we should become possessed of an assortment of remuneratory expedients, applicable to almost every class in society. Everything depends, however, upon the mode of application. For this duty, governments are entirely unfit: it is local inspection alone which can gain a knowledge of circumstances and superintend the details.

After all, just and discriminating public esteem — that is to say, public esteem founded upon the principle of utility—is the most potent, the most universally applicable, of all the species of reward. If virtue be held in public estimation, virtue will flourish: let it cease to be held in such estimation, it will decline in the same proportion. The character of a people is the moral climate which kills or vivifies the seeds of excellence.

An inquiry into the causes of the high respect in which, under certain governments, particular virtues were held — why the virtues of a *Curtius*, of a *Fabricius*, of a *Scipio*, were nourished and developed at Rome — why other countries and other times have produced only courtiers, parasites, fine gentlemen and wits, men without energy and without patriotism, — would require a moral and historical analysis, only to be completed by means of a profound study of the political constitutions and particular circumstances of each people. The result would, however, prove, that the qualities most successfully cultivated, were those held in most general esteem.

But public esteem, it may be said, is free, essentially free, independent of the authority of governments. This copious fund of rewards is therefore withdrawn from the hands of the supreme authority! This, however, is not the case: governments may easily obtain the disposal of this treasure. Public esteem cannot be compelled, but it may be conducted. It requires but little skill on the part of a virtuous sovereign to enable him to apply the high reward of public esteem to any service which his occasions may require.

There already exists a degree of respect for riches, honour, and power: if the dispenser of these gifts bestow them only upon useful qualities—if he unite what is already esteemed to what ought to be estimable, his success is certain. Reward would serve as a proclamation of his opinion, and would mark out a particular line of conduct as meritorious in his eyes. Its first effect would be that of a lesson in morality.

Unrewarded, the same service would not acquire the same degree of notoriety. It would be lost among the multitude of objects soliciting public attention, and remain undistinguished from the pretensions, well or ill founded, respecting which public opinion is undecided. Furnished with this patent from the sovereign, it becomes authentic and manifest: those who were ignorant are instructed, those who were doubtful become decided: the inimical and the envious are rendered less bold: reputation is acquired, and becomes permanent. The second effect of the reward consists in the increase of intensity and duration given to public esteem.

Immediately, all those who are governed by views of interest, who aspire to honour or fortune — those who seek the public good, but who seek it like ordinary men, not as heroes or martyrs — eagerly press into that career in which the sovereign has united private and public interest. In this manner, a proper dispensation of favours directs the passions of individuals to the promotion of the public welfare, and induces even those who were indifferent to virtue or vice, to rank themselves upon that side which promises them the greatest advantage.

Such being the power of sovereigns, he must be extremely inexpert in the distribution of honours, who separates them from that public esteem which has so decided a tendency to unite with them. Nothing, however, is more common. Instances may be found, in most courts, of splendid decorations of stars and garters in double and triple range, which do not even give a favourable turn to public opinion. They are considered as proofs of favour, but not as signs of merit.

"Honours in the hands of princes resemble those talismans with which the fairies, according to the fables, were wont to present their favourites: they lose their virtue whenever they are improperly employed."*

CHAPTER XVII.

ACCOMPANIMENTS TO REMUNERATION.

AFTER having exhibited in what manner the matter of wealth is applicable to the purposes of reward, we proceed to show other uses derivable from it for the public service, which are not remuneratory.

The idea of reward will be much clearer when it shall have been distinguished and separated from these accessory uses, which have certain relations with it: —

1. *Wages necessary for the support of life.* — Servants must be fed whilst they are employed, and there are cases in which it is necessary to feed them even before they begin to work. If the wages paid do not exceed what is necessary for this purpose, as is sometimes the case among the soldiery, and espe-

* Helvetius.

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cially if the enrolments are involuntary, such wages, being absolutely necessary, are not reward.

2. *The instruction of servants.* — Certain kinds of service require advances from government for this object. If this instruction require much time, it is naturally begun at an early age, and is then called education. This employment of the matter of reward is sufficiently distinct from that which regards subsistence, with which, however, it is very frequently combined and confounded. If there be a sufficient number of individuals willing to bear this expense, so much the better; otherwise, it is necessary that government should bear it for them. This has almost everywhere been thought to be the case with respect to the church. It has also generally been considered necessary in new countries, or countries but little advanced in the career of prosperity with respect to the teachers and professors in most branches of science. In the war department, the corps of cadets is a nursery for young officers. The foundations of public schools are nurseries for the church. The greater number, however, of these foundations, are owing rather to the good intentions of individuals, than to the cares of governments.

3. *Equipment.* — That an individual may be in a condition to render service, he must be furnished with the necessary equipments. The warrior wants his accoutrements — the astronomer his observatory — the chemist his laboratory — the mechanic his machines — the naturalist his collections of natural history — the botanist his garden — the experimental farmer a plot of ground, and funds to enable him to improve it

4. *Indemnity.* — When an individual is only indemnified, he is not rewarded: reward, properly speaking, only begins when indemnity is complete. Do we wish for services, we ought to recollect that, by the person from whom we seek to obtain them, the inconveniences of every sort which compose the burthen of the service will be put into one scale, the advantages he finds attached to it into the other. To the head of indemnity belongs everything necessary to produce an equilibrium between the two; it is only the excess which is thrown into the scale of advantages which strictly belongs to the head of reward.

5. *The assuring responsibility.* — In so far as the matter of reward is employed for this purpose, it is employed in laying a foundation for the infliction of punishment. The stock of punishment is in itself inexhaustible; but when the body is withdrawn from the hands of the ministers of justice, corporal punishment cannot be inflicted, and all other punishments can be compensated. If a servant possess property of his own, so much the better: if he possess none, and a salary be given to him, he will always have so much to lose; the loss of this salary will be a punishment he will always be liable to undergo, whatever may become of him.

The principal use of this employment of the matter of reward, is in the case of offices which place property in the hands of those who fill them. If there be no other means of securing their probity, it would not be bad economy to make their appointments amount in value to but little less than the highest interest they could reap from the largest sum they ever have in their hands. This would be to make them assure against their own dishonesty. The difference between the actual salary and the least salary they could be induced to accept, would constitute the premium. It is rarely that a distinct sum is appropriated to this purpose: on the one hand, this end is partly effected by suretyship; and on the other, the sum considered requisite for the purposes of indemnity and reward equals or surpasses what could be proposed to be allowed for it: but this function is not the less distinct from all the rest.

6. *A guarantee against temptations.*—Money, like the most valuable articles of the medical pharmacopœia, may serve either as a poison or an antidote, according as it is applied. This employment of the matter of reward resembles that last mentioned, without being confounded with it. Money employed for assuring responsibility will produce its effect, though the individual be already corrupted. The use of money employed as a guarantee against temptation, is to prevent corruption. A less sum may suffice in this case than in the former: in that, it was necessary that the revenue granted should preserve some proportion to the sum confided; in this, such proportion is not required: the measure to be observed is only that of the wants of the individual placed in the rank that the office he occupies confers. In a word, salary, considered as a pledge, is only useful in the prevention of theft; money, employed as an antiseptic, is equally useful in the prevention of peculation in all its forms, in the prevention of all improper conduct which can have for its motive the desire of money, and for its means the situation in which the individual is placed by his office.

7. *The support of dignity.* — Public opinion exacts — it matters not by what reason — from every individual possessed of a certain rank, a certain expenditure: his wants are thus increased in proportion to his dignity. Dignity, deprived of the wealth necessary for its support, furnishes, in proportion to its extent, an incentive to malversation, and at the same time generally furnishes the opportunity. As an antidote to such temptations, money may therefore sometimes be bestowed for the sup-

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port of dignity. The good of the service may also require the same thing. It is incontestably true, that between wealth and power there subsists an intimate and natural union. Wealth itself is power: it may be proper, therefore, that the support of the respect which it commands be not refused in favour of certain employments, in which much depends upon the place they hold in public opinion.

8. Another use of the matter of reward consists in *the excitement of alacrity;* I mean, the production of an habitual disposition to do what is required with pleasure. The greater the degree of mental enjoyment, the quicker and more lively are one's ideas, and the larger the quantity of work which can be performed in a given time. The mind, in a happy mood, acts with incomparably more ease than when agitated by grief; or even in its ordinary condition, when it is moved only by habit. It is the same with the bodily powers. Who knows not how much the power of the muscles depends upon the energy of the mind? What comparison is there between the labour of slaves and of free men? It is upon this that the superiority of hired soldiers over unpaid and arbitrary levies depends. In the one case, as in the other, the motive which leads to exertion consists in the expectation of being treated according to their behaviour: the motive is nothing else but the fear of pain. But in the first case, there is the gratification of reward to sustain the alacrity; in the other, the labour has no other accompaniment but grief.

The simple expectation of a reward, how large soever it may be, will not always produce the same effect as a reward previously bestowed. The condition of expectancy in which the individual finds himself in such a case, is a mixed and uncertain state, in which despair and hope may alternately predominate.

The danger to be guarded against is, lest rewards previously bestowed should produce diversions little favourable to labour, either by suggesting the idea of some more favourite occupation, or by supplying the means of its pursuit. The progress of the thoughts may be accelerated, but the thoughts excited may be of a different nature: the dull ideas of labour may be supplanted by the enlivening considerations of shows and of pleasure.

Whether or not it is proper to bestow such rewards, depends upon the character of the individual: that character must be known, before it is possible to determine what will be their effect; but in every case there can be no greater folly than to waste in previous gratifications everything which is destined for reward.

In conclusion, these distinctions ought not to be abused. The expense of rewards need not be increased on account of each of these items; it is not necessary to appropriate a distinct sum to each. The same sum may serve for many, and even for all. That which suffices for assuring responsibility, will in general suffice as a guarantee against temptations, and *vice versâ*, so far as ends so uncertain may be effected by such means, — and will in every case suffice for indemnification. That which suffices for equipment, may serve in part for the support of dignity and the excitement of alacrity: that which suffices for the maintenance of dignity will be sufficient for almost all the other ends; and the whole of whatever is employed for any other of these purposes, except equipment, cannot but serve for subsistence.

BOOK II. — REWARDS APPLIED TO OFFICES.

CHAPTER I.

SALARY — HOW A REWARD.

THERE are many species of service, and even services of a positive nature, of which governments stand in constant and uninterrupted need: such for the most part are the duties of those who are employed in the different departments of every government. The political state or condition, on account of which individuals possessing it are considered liable to render these services, is called a place, an office, or an employment. To these places it is both natural and customary to attach, under the title of emolument, certain portions of the matter of wealth. If such emolument be determinate in amount, and paid at regularly recurring periods, it is called a salary.

It is the nature of a reward to operate as a motive, and in that capacity to give birth to acts which, by the person by whom the reward is held up to view, are esteemed services: the greater the reward, the greater is the motive it constitutes; the greater the motive, the more strenuous the exertion it has a tendency to produce: and if the value of the service be susceptible of an indefinite degree of perfection, the more strenuous the

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exertion to perform it, the greater, as far as depends upon the will of the party, will be the value of the service. Hence it follows, that if salary be reward, as far as funds can be found, salaries cannot be too large. How different the state of things presented to us when we consult experience! We see small salaries, and the service admirably well performed: large salaries, and nothing done for them. In certain lines, we see the service regularly worse and worse performed, in proportion to the largeness of the salary. Where then lies the error? In experience there can be none: in the argument there is none. The error lies in its not being properly understood: and that in general it has not been properly understood, the bad management and weak measures so frequent in this line are but too pregnant proofs. To understand the argument aright, two points must be observed: The one is, to consider, for illustration's sake, that just in the same manner as punishment, — and in no other manner, though with less certainty of effect, — is reward capable of acting as a motive: the other point is, to consider what is really the service for which a salary is a reward.

What, then, is the service, with respect to which a salary operates as a motive? The answer which would be generally given to this question is, the *continued* service belonging to the office to which the salary is annexed. Obvious as this answer may seem, it is not the true one. The service, and the only service, with respect to which a salary can operate as a motive, is either the simple instantaneous service of taking upon one the office, or the permanent service of continuing to stand invested with it. If the duties of the office — the services in the expectation of which the salary annexed to the office is bestowed, happen to be performed, it cannot be owing merely and immediately to the salary: it must be owing to some other motive. If there were no other motive, the service would not be rendered. Nothing is done without a motive: what, then, is this other motive? It must be either of the nature of reward or punishment. It may by possibility be of the nature of reward; but if it be so, one or other of these rewards would seem superfluous: in common, it is principally of the nature of punishment. In as far as this is the case, the service for which the salary, considered as a reward, is given, is the service of taking upon one the obligation constituted by the punishment — the obligation of performing the services expected from him who possesses the office.

That the zeal displayed in discharging the duties of an office should not be in proportion to the salary, will now no longer appear strange. Experience is reconciled to theory. This subject will receive elucidation, if we substitute punishment for reward, and consider what tendency such a motive would have to give birth to any service, if connected with it in the same manner as a salary is annexed to an office.

Suppose a schoolmaster, intending to conduct the business of his school with regularity, were to make it a rule, on a certain day, at the beginning of every quarter, to call all his scholars before him, and to give each ten lashes, committing their behaviour during the rest of the quarter altogether to their discretion: — the policy of this master would be the exact counterpart of the founder of the school towards the master, if he has sought to attach him to the duties of his office by bestowing upon him a salary. Suppose the master, finding that under this discipline the progress of his scholars did not equal his expectations, should resolve to increase his exertions, and accordingly should double the dose of stripes: — his policy in this case would be the exact counterpart of the founder, who by the single operation of increasing the master's salary, should think to increase his diligence.

A salary is not a reward for any individual service of the number of those which are rendered in consequence of a man's acceptance of the office to which the salary is annexed. For the rendering of any one of these services, the salary presents him not with any motive which can come under the head of reward: the motives which it gives him belong entirely to the head of punishment. It is by fear only, and not by hope, that he is impelled to the discharge of his duty—by the fear of receiving less than he would otherwise receive, not by the hope of receiving more. Though he work ever so much more or better than a man who holds his office is expected to work, he will receive nothing more than his salary, if the salary be all that he has to hope for, By working to a certain degree less or worse, he may indeed stand a chance of having the salary, or a part of it, taken from him, or he may be made punishable in some other way: but if he continue to keep clear of that extreme degree, in such case let him work ever so little or ever so badly, he will not, as far as artificial punishment is concerned, be ever the worse. He has therefore no motive, so far as the salary is concerned, for endeavouring to pass the line of mediocrity; and he has a motive, the motive of indolence or love of ease, for stopping as far short of it as he can with safety.

Suppose, for instance, a salary of £4000 a-year annexed to the office of a judge: of all the services he may come to perform in the discharge of his function, of which one is this salary the reward? Of no one whatever. Take any one of the causes which would regularly come before him for hearing: though he were to attend, and to display ever so much

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diligence and ever so much ability in the hearing of it, he would receive no more that year than his £4000; though he were to absent himself altogether, and leave the business to his colleagues, he would receive no less: in short, provided he does not so far swerve from his duty as to subject himself to fine or deprivation, whether he perform his duty ever so well, or ever so ill — whether he decide many causes or few — whether his attendance be constant or remiss — whether he display ever so much or ever so little ability, — his salary is the same. Not that a man in this exalted station is in any want of motives to prompt him to exert himself in the discharge of its duties: he has the pleasures of power, to balance the pains of study — the fear of shame, to keep him from sinking below mediocrity — the hope of celebrity, to elevate him above it, to spur him on to the highest pitch of excellence. These motives are presented to him by his station, but they are not presented to him by his salary.

The services, and the only services, which the salary presents a motive for his performing, are, in the first place, the instantaneous act of taking upon him the station — that is, of subjecting himself to the obligations annexed to it; and in the event of his violating any of those obligations, to the punishments annexed to such violations: in the next place, the discharging of the smallest portion of those obligations which it is necessary he should discharge, in order to his receiving such or such part of the salary. Let it, for instance, be paid him quarterly: if the first quarter be paid him in advance, it will afford him no motive of the nature of reward for doing any of the business of that quarter. He has that quarter's salary; nor can he fail of enjoying it, unless, in the way of punishment, it be afterwards taken from him. If it be not paid him till the end of the quarter, the case will be still the same, unless proof of his having rendered certain services — the having attended, for example, at certain times — be necessary to his receiving it. With this exception, it may equally be said, that in both cases, for any other than the instantaneous act of taking upon him the burthen of the station for that quarter, he has no reward, nor any motive but what operates in the way of punishment.

This distinction is of importance; for if the salary given were the inducement of performing the services, the chance of having them performed, and well performed, would be exactly as the magnitude of the salary. If, for example, fifty pounds sterling a-year sufficed to insure fifty grains of piety, assiduity, eloquence, and other sacerdotal virtues in a curate, — five thousand of these same pounds ought to insure five thousand grains of these same virtues in a bishop or archbishop. But what everybody knows is, that this proportion does not hold; on the contrary, it most frequently happens that the proportion is inverse: the curate labours much, the bishop little, and the archbishop less.

The chance of service is as the magnitude of the punishment; and if the salary can be withdrawn, it is so far indeed as the magnitude of the salary: but it may be equally great without any salary—by the substitution of any other punishment instead of loss of salary.

We see, then, how it is that a salary, be it great or small, independently of the obligation which it pays a man for contracting, has not in itself the smallest direct tendency to produce services; whilst experience shows, that in many cases, in proportion to its magnitude, it has a tendency to prevent them.

CHAPTER II.

RULES AS TO EMOLUMENTS.

BEFORE we enter upon this subject in detail, it may be necessary to remark, that the proper application of the following rules will depend upon the nature of the service required, and its various local circumstances. It is only by observing the peculiar character assumed by abuse in each office, that appropriate remedies for each particular evil can be provided. Since it is impossible to make a complete catalogue of all errors, and to anticipate every species of abuse, the rules laid down may not constitute a perfect system. They may, however, serve as a warning against errors and abuses which have by experience been found to exist, and also against some which may be imagined likely to exist. It is useful to erect beacons upon rocks whose existence has been made known by the shipwrecks they have caused. Among the rules about to be given, some may appear so self-evident as almost to seem superfluous: but if it can be shown that errors have arisen from the neglect of them in practice, such rules, though not entitled to be considered as discoveries, must at least be regarded as necessary warning; they may teach nothing new, but they may serve to recall principles which it is desirable should be constantly and clearly remembered.

Rule I. Emoluments ought in such manner to be attached to offices, as to produce the most intimate connexion between the duty and the interest of the person employed.

This rule may be applied in insuring assiduous attendance on the part of the persons employed. In different offices, different services are required; but the greater number of offices have this one circumstance in common: that their duties may be performed, it is necessary that the individual holding the office should be at a certain time in a certain

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place. Hence, of all duties, assiduous attendance is the first, the most simple, and the most universal. In many cases, to insure the performance of this duty, is to insure the performance of every other duty. When the clerk is at his desk, the judge upon the bench, the professor in his school, — if there be nothing particularly irksome in their duty, and they can do nothing else, rather than remain idle, it is probable they will perform their duty. In these cases, the service required being of the continual kind, and in point of quality not susceptible of an indefinite degree of perfection — the pay being required not for certain services, but for such services as may come to be performed within a certain space of time, — it may without impropriety be given in the form of a salary. But even here, the policy of making reward keep pace with service* should be pursued as closely as possible; and for this purpose, the long continued mass of service should be broken down into as many separate services as possible — the service of a year into the service of days. In the highest offices, an individual, if paid by his time, should, like the day-labourer, and for the same reason, be paid rather by the day than by the year. In this way he is kept to his duty with more than the effect, and at the same time without any of the odium, of punishment.

In the station of a judge, it is not common to exact attendance by the force of punishment—at least not by the force of punishment to be applied in each instance of failure. But if it were, the infliction of that punishment for trivial transgressions — that is, for one or a few instances of non-performance — would be thought harsh and rigorous, nor would anybody care for the odium of standing forth to enforce it. Excuses would be lightly made, and readily accepted. Punishment in such cases being to the last degree uncertain, would be in a great measure ineffectual. It might prevent continual, but it would never prevent occasional, or even frequent, delinquency. But what cannot be effected by punishment alone, may be effected by punishment and reward together. When the officer is paid separately for each day's attendance, each particle of service has its reward: there is for each particle of service an inducement to perform it. There will be no wanton excuses, when inconvenience adheres inseparably to delinquency without the parade of punishment.

The members of the French Academy, and the Academy of Science, notwithstanding all their dignity, are paid their salaries by the day, and not by the year. And who are the individuals, how low or how high soever, who cannot, and who ought not, to be paid in this manner? If pride have a legitimate scruple, it is that which refuses to receive the reward for labour which it has not performed; whilst, as to the objection which might arise from the minute apportionment of the salary, it is easily removed by counters given from day to day, and converted into money at fixed periods.

In the act of parliament for establishing penitentiary houses, among other good regulations, this method of insuring assiduity of attendance has been adopted. The three superintendents receive, as the whole of their emoluments, each a share of the sum of five guineas, which is directed to be distributed each day of their attendance equally among those who are present.

A more ancient example of this policy may be found in the incorporated society in London for the assurance of lives. The directors of this establishment receive their trifling emoluments in this manner; and thus applied, these emoluments suffice. This plan has also been adopted in the case of commissioners of bankrupts, and by different associations.

These examples ought not to be lost; and yet, from not having been referred to general principles, they have not possessed the influence they ought to have. How often have regulations been heaped upon regulations without success! How many useless decrees were made in France to insure the residence of the bishops and beneficed clergy!

In England, we have not in this respect been more successful; that is to say, more skilful. Laws have been enacted against the non-residence of the clergy—laws badly contrived, and consequently useless. Punishment has been denounced, and a fine imposed, which being invariable in amount, has sometimes been greater and sometimes less than the advantage to be derived from the offence. For want of a public prosecutor in this, as in so many other cases, it has been necessary to rely upon such casual informers as may be allured by a portion of the fine. The love of gain has seldom proved a motive sufficiently strong to induce an endeavour to obtain this reward; whose value, not to mention the expenses of pursuit, is destroyed by infamy. Till this motive be reinforced by personal animosity, which bursts the bonds of infamy, these laws are powerless.

Such cases, which may occur once or twice in the course of ten years throughout the whole kingdom, are neither sufficiently frequent, nor well known, to operate as examples. The offence remains undiminished: the useless punishment constitutes only an additional evil; whilst such laws and such methods, powerless among friends, serve only to bring enemies into contact! Whenever it is desirable that a clergyman should live in the midst of his parishioners — that is to say, when they are amicable — the law is a dead

* See Book I. Chap. X. Rule 3.

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letter: its power is exerted only when they are irreconcilable enemies; that is, in the only cases wherein its utility is problematical, and it were to be wished that its execution would admit of an exception. His return into his parish is a triumph for his enemies, and a humiliation for himself.

Had the salaries paid to the professors in the universities been interwoven with their services, it might have been the custom for some of these pretended labourers to have laboured for their hire; and to be a professor, might have meant something more than having a title, a salary, and nothing to teach.

A salary paid day by day has an advantage beyond that of insuring assiduity of attendance; — it even renders a service agreeable, which with an annual salary will be regarded as purely burthensome. When reward, instead of being bestowed in a lump, follows each successive portion of labour, the idea of labour becomes associated with pleasure instead of pain. In England, husbandmen, like other labourers, are paid in hard money by the week, and their labour is cheerfully and well performed. In some parts of the continent, husbandmen are still paid as they were formerly in England, by houses and pieces of land given once for all; and the labour is said to be performed with all the slovenliness and reluctance of slavery.

Rule II. Emoluments ought in such manner to be attached to office, as to produce the greatest possible degree of excellence in the service rendered.

Thus far the subject has only been considered as applicable to insuring attendance in cases where assiduity of attendance appears to suffice for insuring the performance of all other duties. There follow some cases, in which it appears possible to apply the same principle either in the prevention of abuse, or in insuring an extraordinary degree of perfection in the employment of the powers which belong to certain stations.

Instead of appointing a fixed salary, invariably of the same amount as the emolument of the superintendent or superintendents of a prison, a poor-house, an asylum for orphans, or any kind of hospital whose inhabitants depend upon the care of one or a small number of individuals, whatever may be the difference in the degree of attention displayed, or the degree of perfection with which the service is performed, — it would be well to make the emolument of such persons in some measure depend upon the care with which their duties have been performed, as evidenced by their success. In a penitentiary, or other prison, that the prisoners might be insured from all negligence or ill-treatment, tending directly or indirectly to shorten their lives, make a calculation of the average number of deaths among the prisoners in the particular prison, compared with the number of persons confined there. Allow the superintendent each year a certain sum for each person of this number, upon condition, that for every prisoner who dies, an equal sum is to be withheld from the amount of his emoluments. It is clear, that having a net profit upon the lives of all whom he preserves, there is scarcely any necessity for any other precaution against ill-treatment, or negligence tending to shorten life.*

In the naval service, the laws of England allow a certain sum for each vessel taken or destroyed, and so much for every individual captured. Why is not this method of encouragement extended to the military service?

Is the commander of an army employed in defending a province, — allow him a pension which shall be diminished in proportion to the territory he loses. Is the governor of an important place besieged, — allow him so much for every day that he continues the defence. Is the conquest of a province desirable, — promise to the general employed, besides the honours he shall receive, a sum of money which shall increase in proportion to the territory he acquires, besides giving him a pension, as above, for preserving it when acquired.

To the principal duty of taking and destroying those who are opposed to him, might be added the subordinate duty of preserving the living machines whose exertions are necessary for its accomplishment. The method proposed for the preservation of prisoners, — why should it not be employed for the preservation of soldiers? It must be acknowledged, that no reward exclusively attached to this subordinate duty could, in the mind of a prudent commander, add anything to the weight of those arguments which arise out of the principal object. A soldier when he is ill, is worth less than nothing: a recruit may not arrive at the moment — may not arrive at all, and when he has arrived, he is not like a veteran. If therefore, it be proper to strengthen motives thus palpable, by a separate and particular reward, it ought at least to be kept in a subordination sufficiently marked with respect to the principal object.

Thus much as to a time of war. In time of peace, the propriety of this method is much less doubtful. It is then that the attention of a general should be more particularly directed

* "The managers of *L'Hôtel Dieu* were used to charge fifty livres for each patient who either died or was cured. M. de Chamousset and Co. offered to undertake the management for fifty livres, for those only who were cured. All who died were not to be reckoned in the bargain, and were to be at their expense. The offer was so admirable, it was not accepted: it was feared that they would not be able to fulfil their engagement. Every abuse which it is attempted to reform is the patrimony of those who have more credit than the reformers." — *Quest. Encycl.* art. *Charité.*

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to the preservation of his soldiers. Make him the insurer of their lives, and he will become the rival of Esculapius in medical science, and of Howard in philanthropy. He will no longer be indifferent, whether they encamp upon a hill or in a morass. His vigilance will be exercised upon the quality of his supplies and the arrangement of his hospitals; and his discipline will be rendered perfect against those vices of armies, which are sometimes no less destructive than the sword of the enemy.*

The same system might be extended to ships of war, in which negligence is so fatal, and in which general rules are so easily enforced. The admiral, or captain, would thus have an immediate interest in the preservation of each sailor. The admirable example of Captain Cook, who circumnavigated the world, and traversed so many different climates and unknown seas, without the loss of a single sailor, would no longer be unfruitful. His instructions respecting diet, change of air, and cleanliness, would not be neglected. The British navy, it is true, is much improved in these respects: but who can tell how much greater perfection might be attained, if to the already existing motives were added the influence of a constantly acting interest, which, without injuring any virtue, might supply the place of all, if they were wanting?

In the application of these suggestions, there may be difficulties: are they insurmountable? It is for those who have had experience to reply.

In the treaty made by the Landgrave of Hesse Cassel, relative to the troops which the British government hired of him to serve in America, one stipulation was, that for every man not returned to his country, he should receive thirty pounds. I know not whether such a stipulation were customary or not: but whether it were or not, nothing could be more happily imagined, either for the fiscal interest of the sovereign lender, or the interest of the individuals lent. The spirit of party found in this stipulation a theme for declamation, as if its only effect were to give to the prince an interest in the slaughter of his subjects; whilst, if anything could counterbalance the mischievous effects of the treaty, it was this pecuniary condition. It gave to these strangers a security against the negligence or indifference of the borrowers, on account of which they might more willingly have been exposed to danger than native subjects. The price attached to their loss would act as an insurance that care should be taken to preserve them.

* A slight sketch is all that can be attempted: the details would occupy too much space. A general might be made the insurer, as it respects those who die of disease, but not of those who are killed.

It has been said, that in some countries the emoluments of the commanders of regiments increase in proportion to the number of non-effectives; that is to say, that they receive always the same amount for the pay of their corps, though they have not always the same number of men to pay. Such an arrangement is precisely the opposite of what is recommended above. The number of non-effectives increasing by death or desertion, the commander gains in money what he loses in men. Every penny which he is thus permitted to acquire is a reward offered, if not for murder, at least for negligence.

Note. — The principles thus laid down by Mr. Bentham are susceptible of great diversity of application. When Mr. Whitbread brought into parliament his bill for the establishment of schools for the education of the poor, I flattered myself that I had discovered one instance to which they might very readily be applied; and, in a letter addressed to Sir Samuel Romilly, from which the following paragraphs are extracted, I explained my ideas upon the subject. It will be perceived, that the whole plan depends upon the principles laid down in this chapter: —

"Mr. Whitbread has been fully aware of the necessity of superintendence in respect to the masters, — and he has proposed to commit it to the clergymen and justices of the peace; but it is not difficult to foresee, that this burthensome superintendence will be inefficacious. No good will be effected unless the interest of the master be constantly combined with all parts of his duty. The only method of accomplishing this, consists in making his reward depend upon his success; in giving him no fixed salary; in allowing him a certain sum for each child, payable only when each child has learned to read; — in a word, in paying him, as workmen are sometimes paid, by the work done.

"When he receives a fixed salary, the master has only a slight interest in the progress of his pupils. If he act sufficiently well to prevent his being discharged, this is all that can reasonably be expected.

"If he receive no reward till the service be performed, he has a constant interest in performing it quickly. He can relax his exertions only at his own expense. There is no longer any necessity for superintendence. The master will himself seek to improve the modes of instruction, and to excite the children to emulation. He will be disposed to listen to the advice, and to profit by the experience of others.

"When he receives a fixed salary, every new scholar increases the trouble of the master, diminishes his exertions, and disposes

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him to complain. Upon the plan which I propose, it is the master who will stir up the negligent parents; it is he who will become the servant of the law. Instead of complaining that he has too many pupils, he will only complain if he have too few. Should he have three or four hundred, or even as many as Mr. Lancaster, like him he would find the means of attending to them all; he would employ the most forward in instructing those who were less advanced, &c. &c.

"Should a negligent or incapable master be appointed, he would be forced to quit his place. Substitute for this plan, examinations, depositions, and decisions, and see what would be the consequence.

"There would be no difficulty in the execution of this proposed plan. It would be sufficient that twice or thrice in the year, the clergyman, and certain justices of the peace, or other persons of consequence, who were willing to promote so useful a work, should meet together for two or three hours at the school-house. The examination of each scholar would not occupy more than half a minute. The master himself might be trusted for selecting only such as were capable of undergoing the test, and an honorary would thus be added to his pecuniary reward, by the publicity given to his success."—*Dumont.*

CHAPTER III.

FEES AND PERQUISITES—NONE.

ANOTHER expedient is often employed in the payment of public officers: I refer to the fees which they are sometimes authorized to receive on their own account, from those who require their services.

This arrangement is attended with a specious advantage, and a real danger. The advantage is, that the reward seems to be exactly and directly in proportion to the labour performed: the danger lies in the temptation given to such officers to increase their emoluments, by increasing the difficulties of those who need their services. The abuse is easily introduced. It is very natural, for example, that an individual who has been served with an extraordinary expedition, should add something to the accustomed fee. But this reward, bestowed on account of superior expedition in the first instance, infallibly becomes a cause of delay in all which follow. The regulated hours of business are employed in doing nothing, or in doing the least possible, that extraordinary pay may be received for what is done out of office-hours. The industry of all the persons employed will be directed to increasing the profit of their places, by lending one another mutual assistance; and the heads of departments will connive at the disorder, either for their share of the benefit, or out of kindness to their inferiors, or for fear of rendering them discontented.

The inconveniences will be yet greater, if they relate to a service covered with a mysterious veil, which the public cannot raise. Such is the veil of the law. The useless and oppressive delays in legal procedure arise from very complicated causes; but it cannot be doubted, that one of the most considerable of these causes is the sinister interest which lawyers have in multiplying processes and questions, that they may multiply the occasions for receiving fees.

Integrity is more easily preserved in public offices in which there are no fees, than in those where they are allowed. A lawful right often serves as a pretext for extortion. The distinction between what is permitted and what is prohibited, in many cases, is exceedingly minute; and how many temptations may occur of profiting by the ignorance of strangers, when circumstances will insure impunity! An easy method of detecting offences is a great restraint. Whenever therefore fees are allowed, a list of them should be publicly fixed up in the office itself: this will operate as a protection to the persons employed against suspicion, and to the public against vexation.

This mode of rewarding services, supposes that the individuals who stand in need of them should bear the expenses of the establishment. This is true only in case the benefit is solely for those individuals: in all other cases, fees constitute an unequal and very unjustly assessed tax. We shall have occasion to recur to this subject shortly.

CHAPTER IV.

MINIMIZE EMOLUMENT.

Rule III. THE amount of the salary, or other emoluments, attached to every office, ought to be the least that the individuals qualified to execute its duties are willing to accept for their performance.

The fair and proper price of any vendible commodity is the least that anybody will take for it: so that the expectation of like payment shall be a sufficient inducement to the labour requisite to produce other like articles in future. The fair and proper price of any service is the least that anybody will do it for: so that if more were given, it would be done either not at all the better, or not so much the better as that the difference of quality should be equivalent to the difference of expense. In this proper and necessary price is included, of course, everything necessary to enable the individual to perform, and to continue to perform, the service; and also whatever is necessary on account of the disadvantages attending the service, and on ac-

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count of the chance which may be given up of the advantages that might be expected from other services.

At the first establishment of an office, it may be difficult accurately to determine what ought to be the amount of its emoluments: in this, as is the case with every commodity when carried to market for the first time, we can only be guided by chance. The number and character of the candidates will, however, soon determine whether the amount offered be too large or too small.

According to this rule, the salaries paid to the judges in England, which appear so considerable, are scarcely enough; since, as we have already seen, they are not sufficient to induce those who are best qualified to discharge the duty, to undertake the office.

In France, before the Revolution, scarcely any salaries were paid to the judges: they were not drafted from the class of advocates, and no sacrifice was required of them when they entered upon their duties; it was not necessary that they should be possessed of much experience, and their reward consisted principally in the honour and respect attached to their station. In England, the number of judges is so small, that there is no place for cyphers: it is necessary that each judge should possess, from the first day he enters upon his office, that skill which, in the present state of immensity and obscurity in which the law is found, can only be the fruit of long study. In France, among the enormous multitude of her judges, there was always a sufficient number endowed with the requisite skill; and the novice might, so long as he chose, preserve a Pythagorean silence.

A method of ascertaining the proper amount of emoluments for any office, simple as it is efficacious, is afforded by allowing the persons employed to discharge their duty by deputy. If no one employ a deputy, the emoluments cannot be much too great: if many individuals employ deputies, it will be only necessary to observe what is paid to the deputies: the salary of the deputy is the proper salary for the place.

If this rule be applied to the emoluments of the clergy, and it be asked what is the proper price for their services, the answer is not difficult. It is, *primâ facie*, the price given by one class of the clergy, and received by the other; it is the current price of curacies. I say always *primâ facie;* for, in reality, the current price is somewhat greater; part of the price being made up in hope. For insuring the due performance of all the duties of their office, this price is found to be sufficient. The possession of any greater emolument is not only useless but pernicious, inasmuch as it enables them to engage in occupations incompatible with the due performance of their function, and as it tends to give them a distaste for the duties of that function.

The inequality observable in the emoluments of the established clergy is also disadvantageous in respect to the greater number of ecclesiastics. The comparison which they make between their condition, and that of the rich incumbents, diminishes still further, in their eyes, the value of what they receive. A reward so unequal, for equal services, degrades those who receive only their proper portion. The whole presents the appearance of a lottery — of favour and injustice, ill according with the moral character of their vocation.

It is a good rule of economy to employ only real labourers, who do not think themselves superior to the work they have to perform. Dutch florists ought not to be employed in the cultivation of potatoes.

It is well also fully to occupy the time of the individuals employed. The duties of many public offices require only three or four hours attendance daily. After the office-hours are passed, such individuals seldom are able profitably to employ their time. The leisure they possess increases their wants. Ennui, the scourge of life, is no less the enemy of economy. It is among this class, that those who are most discontented with their salaries, are generally found.

CHAPTER V.

NO MORE NOMINAL THAN REAL.

Rule IV. The nominal and real amount of salaries ought to correspond.

In other words, no deduction ought to be made from the real value of a salary, without reducing its nominal amount. The practice which has frequently been adopted in England, of reducing the real value of salaries and pensions by taxes and other deductions, while the nominal amount of the salaries has remained unaltered, has given rise to this rule. In some instances, the deductions thus made have amounted to one-third of the nominal salary.

No advantage arises from this arrangement, but its inconveniences are numerous. In the first place, it is an evil in so far as it spreads an exaggerated idea of the sacrifices made by the public, and the expense incurred under the head of salaries. With respect to the public functionaries, it is an evil to possess an income greater in appearance than reality. The erroneous conceptions hence entertained of their wealth, imposes upon them, in deference to public opinion, the necessity of keeping up a correspondent establishment: under the penalty of being considered niggardly, they are compelled to be extravagant. It is true, the public are aware in general, that salaries and

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pensions are subject to deductions; but they are oftentimes only acquainted with a part of the deductions, and they seldom in such cases enter into minute calculations.*

In this manner, the difference between the nominal and real value of a salary tends to produce an increase in the wants of the individual employed. Call the amount of his salary what it really is, and he will be at ease, but every nominal addition will prove a costly ornament. If the opportunity of illicit profit be presented to him, such nominal addition will be an incentive to corruption; and should he not be dishonest, it will prove a cause of distress.

The remedy is simple as efficacious: the change need only be in words.

CHAPTER VI.

COUPLE BURTHEN WITH BENEFIT.

Rule V. THE expenses of an office ought to be defrayed by those who enjoy the benefit of the services rendered by the office.

The author of the Wealth of Nations, in investigating† the manner in which the expense of services ought to be divided, has shown that in some cases it ought to be defrayed by the public — in others, exclusively by those who immediately reap the benefit of the service. He has also shown that there is a class of mixed cases, in which the expense ought to be defrayed partly by the public, and partly by the individuals who derive the immediate benefit. To this class belongs *public education*.

The rule just laid down seems scarcely to stand in need of proof. It may, however, be useful to mention the modes in which it may be violated; as — 1. When, for a service rendered to one person or set of persons, the obligation of payment is imposed upon another. This is partly the case of dissenters who support their own clergy, in so far as they are obliged to pay for the support of the clergy of that established sect from which they dissent. 2. When, for a service rendered to a certain number of individuals, the obligation of payment is imposed upon the public: for example, the expenses of a theatre, wholly or in part paid out of the public purse. 3. When, for a service rendered to the public, the obligation of payment is imposed upon an individual.

With respect to this third case, the examples are but too abundant.

1. The most remarkable example will be found in the administration of justice. At first sight, it may be thought that he who obtains a verdict in his favour reaps the principal, or even the only advantage to be obtained; and therefore that it is reasonable he should bear the expense incurred — that he should pay the officers of justice for the time they have been employed. It is in this manner that the subject appeared even to Adam Smith. (B. v. sec. 2.) Upon a closer examination, we shall discover an important error. The individual in whose favour a verdict is given, is precisely the individual who has received least benefit: setting aside the rewards paid to the officers of justice, how many other expenses, which the nature of things render inevitable, remain! It is he who, at the price of his time, his care, and his money, has purchased that protection which others receive for nothing.

Suppose that among a million persons there have been, for example, a thousand lawsuits in a year: without these lawsuits — without the judgments which terminate them, injustice would have had nothing to hold it in check but the defensive energy of individuals. A million acts of injustice would have been perpetrated in the same time. But since, by means of these thousand judgments, a million acts of injustice have been prevented, it is the same thing as if each complainant had himself prevented a thousand. Because he has rendered so important a servive — because he has exposed himself to so many mishaps, to so much trouble and expense, does he deserve to be taxed? It is as though the militia who defend the frontiers should be selected to bear the expenses of the campaign.

"Who goeth a warfare any time at his own charges?" saith St. Paul. It is the poor litigant who makes war upon injustice, who pursues it before the tribunals at his own risk, and who is made to pay for the service which is rendered by him.

When such expenses are thrown upon a defendant, unjustly dragged into the litigious contention, the case is yet worse: instead of anything having been done for his advantage, he has been tormented, and he is made to pay for having been tormented.

If the expenses are altogether thrown upon the party who is found to have done wrong (although it often happens, owing to the uncertainty either of the facts or of the law, that there has been no wilful wrong on either side,) this cannot be done at first: this party can only be known at the termination of the suit. But then such a judgment would be a punishment; and there is a chance that such a punishment may not be deserved; another chance, that the individual may not be in a condition to support it; another chance, that it will be either too great or too little.‡

* A further inconvenience frequently arises from the expense of collecting and managing such peculiar contributions.

† Book V.

‡ There are many other objections to taxes upon law proceedings, but they do not belong to

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II. As another violation of this rule, may be cited the practice of taking fees, as carried on in most custom-houses, and which constituted a great abuse in those of England, previously to the reform introduced by Mr. Pitt. Many of the officers, not receiving salaries sufficient for their maintenance, were allowed to make up the deficiency by fees received for their own advantage. This custom had an appearance of reason. "We pass your merchandise through the custom-house," they might have said; "and you ought to pay for this service." But this reason is deceptive. "Without this custom-house," the merchants might have replied, "our merchandise would have gone straight forward. It is not for our advantage that this costly depôt is established — it is for the general wants of the State; the State, therefore, which you serve, ought to pay you, and not us, whom you torment with your services, which we should be very happy to do without." But it may be said, this expense must be borne by somebody: why should it not be borne by these merchants as well as anybody else? Because it is a partial and unequal tax. Taxes upon merchandise are generally in proportion to the value of the goods; this abusive tax seldom is so. A rich merchant does not feel it; he is reimbursed by the sale of his goods: a poor individual is oppressed by this second contribution, which he finds it necessary to pay to the clerk after he has paid what is due to the Exchequer; and it with reason appears to him the more odious, because it is oftentimes arbitrary.

III. In conclusion, as a last example of the violation of this rule, we mention the emoluments of the clergy, in so far as they consist of tithes. If the services of the clergy contribute to the maintenance of public morality, and obedience to the laws, even those to whom these services are not personally directed are benefited by them — they are useful to the whole state: their expense, whatever ought to be its amount, ought to be borne by the whole community. Distributed as this expense is at present, under the system of tithes, in such manner that every one knows how much and to whom he pays it, no advantage is derived from this knowledge; whilst the inconveniences are but too manifest, in that hatred which so frequently subsists between the parishioners and their minister, the shepherd and his flock; by means of which his labours, so long as this enmity subsists, are rendered worse than useless. Were this expense to be defrayed from the general source of the public treasure, these scandalous dissensions would be avoided; and whether the revenues were more or less ample, it would be possible to preserve a more just proportion between them and the different degrees of labour, instead of floating as at present between £20 and £20,000 per annum, under the direction of chance.*

the present subject. Under the head of procedure, it might be shown that these taxes oppose the ends of justice: under the head of finance, that they constitute a bad source of revenue. The subject has been more fully discussed in the "*Protest against Law Taxes.*"

CHAPTER VII.

BY EMOLUMENTS EXCLUDE CORRUPTION.

Rule V. In employments which expose the public functionary to peculiar temptations, the emoluments ought to be sufficient to preserve him from corruption.

Setting aside all considerations of the happiness of the individual, the interest of the public requires, that in all employments which afford the means of illicit gain, the individuals employed should be placed above want. If this important consideration be neglected, we ought not to be surprised that men urged on by perpetually recurring wants should abuse the powers they possess. Under such circumstances, if they are found guilty of extortion and peculation, they are less deserving of blame than that government which has spread the snare into which it was scarcely possible that their probity should not fall. Placed between the necessity of providing the means of subsistence, and the impossibility of providing them honestly, they will naturally be led to regard peculation and extortion as a lawful supplement, tacitly authorized by the government. The examples of this mischievous economy, and of the inconveniences resulting from it, are more frequent in Russia than under any other European government.

"M. de Launay (Farmer-general under Frederick II.) represented to the king that the salaries of the custom-house officers were too small for their subsistence, and that it would be but justice to augment them; he added, that he could insure to his Majesty that every one would then discharge his duty better, and that the aggregate receipts in all the offices would be larger at the end of the year." — "You do not know my subjects," said Frederick; "they are all rogues where my interests are in question. I have thoroughly studied them, and I am sure they would rob me at the altar. By paying them better, you would diminish my revenues, and they would not rob me less." — "Sire," replied M. de Launay, "how can they do otherwise than steal? Their salaries are not enough to buy them shoes and stockings! a pair of

* Tithes, considered as a tax, are attended with other inconveniences: they belong not to our present subject. They have been exposed by Adam Smith, with that force and precision which characterize that great master.

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boots costs them a month's pay! at the same time, many of them are married. And where can they obtain food for their wives and families, if it is not by conniving at the smugglers? There is, Sire, a most important maxim, which in matters of government is too frequently neglected. It is, that men in general desire to be honest; but it is always necessary to leave them the ability of being so. If your Majesty will consent to make the trial I propose, I will engage that your revenues will be augmented more than a fourth." The maxim in morals, thus brought forward by M. de Launay, appeared to the king, — beautiful and just as it really is in itself, — so much the more excellent from being in the mouth of a financier; since men of this class are not in general reputed to know many such. He authorized the experiment; he increased the salaries of the officers by a half, and his revenues were increased a third without any new taxes.*

A salary proportionate to the wants of the functionary operates as a kind of moral *antiseptic*, or preservative. It fortifies a man's probity against the influence of sinister and seductive motives. The fear of losing it will in general be more than equivalent to the ordinary temptations held out by illicit gains.

But in the estimation of a man's wants, it is not merely to what is absolutely necessary that our calculation ought to be confined; — Fabricius and Cincinnatus are not the proper standards to be selected; the actual state of society ought to be considered; the average measure of probity must be our rule. Public opinion assigns to every public functionary a certain relative rank; and, whether reasonably or not, expects from him an expenditure nearly equal to that of persons in a similar rank. If he be compelled to act in defiance of public opinion, he degrades and exposes himself to contempt — a punishment so much the more afflictive, in proportion as his rank is elevated. Wants keep pace with dignity. Destitute of the lawful means of supporting his rank, his dignity presents a motive for malversation, and his power furnishes the means. History abounds with crimes, the result of this ill-judged policy.

If a justification be required for the extraordinarily high salaries, which it is customary to pay to the supreme magistrates who are called *Kings*, it will be found in the principles above laid down. The Americans, by denominating their chief magistrate a *President*, have thereby made a small salary, compared with what is paid in England to the sovereign, answer every purpose of a large one. Why? Because the dignity of the president is compared with that of the other officers of the republic, whilst in Europe the dignity of the sovereign is measured by a sort of comparison with that of other kings. If he were unable to maintain a certain pomp amidst the opulence of his courtiers, he would feel himself degraded. Charles II., to relieve himself from the restrictions imposed upon him by the economy of parliament, sold himself to a foreign potentate, who offered to supply his profusion. The hope of escaping from the embarrassments into which he had plunged himself, drove him, like an insolvent individual, to criminal resources. This mistaken economy occasioned the expense of two successive wars, terminating in a peace more disastrous, perhaps, than either of the wars. Our strength was wasted in oppressing a necessary ally, instead of being employed in checking the ambition of a rival, with whom we had afterwards to contend with diminished resources. Thus the establishment of the *Civil List*, though its amount may appear large, may be considered as a measure of general *security*,

It is true, that the sum necessary to prevent Charles II. from selling himself, or, in other words, the amount which in this instance would have operated as a mora. antiseptic, or preservative, could not have been very accurately calculated. A greater or less portion of this antiseptic must be employed, in proportion as there exists a greater or less proclivity towards corruption. Experience is the touchstone of all calculations in this respect. Provided these abuses are guarded against, a low scale of salaries can never be an evil; it must be a good. If the salary be not a sufficient reward for the service to be performed, the office will not be accepted: if it be sufficient, everything which is added to its amount, is so much lavished in pure waste.

CHAPTER VIII.

GIVE PENSIONS OF RETREAT.

Rule VII. PENSIONS of retreat ought to be provided, especially when the emoluments allowed are not more than sufficient to meet the absolute wants of the functionary.†

Pensions of retreat are recommended by considerations of humanity, justice, and good economy: they moreover tend to insure the proper discharge of duty, and constitute a source of responsibility on the part of the individuals employed.

* Thiébault, *Mes Souvenirs de Berlin*, tome iv. p. 126.

† The reader ought to be apprised, that having found in Mr. Bentham's MSS. upon this subject, only the memorandum,[a] "*Pensions of Retreat*," I have confined myself to the most simple exposition of the subject: its details would have been too widely extended.—*Note by Dumont.*

[a] See note by Mr. Bentham on this subject, p. 191.

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1. There are many cases in which it is not desirable that a public functionary should continue to be employed after his activity and capacity have become impaired. But since the infirmities of age tend to increase his wants, this is not the time in which he will be able to retrench his expenditure; and he will be induced by this consideration, in his old age and impotency, to continue to endeavour to perform, with pain, and even with disgrace, the duties of a station which in his maturity he had filled with pleasure and reputation. To wait till he voluntarily resigns, is to expect a species of suicide; to dismiss him without a pension of retreat, is, in the supposed state of his faculties, a species of homicide. A pension of retreat removes all these difficulties: it is a debt of humanity, paid by the public to its servants.

2. By means of these pensions, the scale of all salaries may be lower than otherwise, without producing any ill effect upon the quality of the services rendered: they will constitute an *item* in the calculation which every individual makes. In the meantime, government will obtain from all, at a low price, services, the ulterior compensation for which, on account of the casualties of human life, will only be received by a few. It is a lottery in which there are no blanks.

3. In all employments from which the individuals are removable at pleasure, the pension of retreat, in consequence of the approach of the period at which it will become necessary or due, will add an increasing value to the salary, and augment the responsibility of the individual employed. Should he be tempted to malversation, it will be necessary that the profit derivable from his malversation should compensate with certainty, not only for the loss of his annual salary, but also for the value of his future pension of retreat: his fidelity is thus secured to the last moment of his continuing in office.

4. We ought not to forget the happiness insured to the persons employed, resulting from the security given to them by the provision thus made against that period of life which is most menaced with weakness and neglect. Hence an habitual disposition to perform the duties of their office with alacrity will arise; they will consider themselves as permanently provided for, and fixed in a situation in which all their faculties may be applied to the discharge of its duties, without being turned aside by vague apprehensions of future distress, and the desire of improving their condition, which so often leads individuals successively to try different stations. Another advantage to the government: instead of being badly served by novices, it will possess a body of experienced functionaries, expert and worthy of its confidence.

The amount of these pensions ought to be regulated by fixed rules, otherwise they will become a source of abuse: offices will be bestowed for the sake of the pension, instead of the pension being bestowed for the sake of the office. They ought also to increase according to the length of service, leaving at all times an inducement to continued exertion; without which precaution, the services of experienced individuals, which it might be desirable to retain, would frequently be lost.

CHAPTER IX.

OF THE SALE OF OFFICES.

If it be desirable that the public servants should be contented with small salaries, it is more desirable that they should be willing to serve gratuitously, and most desirable that they should be willing to pay for the liberty of serving, instead of being paid for their services. Such is the simple but conclusive train of argument in favour of the venality of offices, abstractly considered.

Such an arrangement is attended with another advantage. A sum laid out in the purchase of an office renders the purchaser responsible in a higher degree than he would be, were he to receive a salary equal to, or even exceeding in amount, the interest of the money he has paid. The loss of a salary paid by the public, is merely the cessation of so much gain; the loss of an office which has been purchased, is the positive loss of so much capital which the individual has actually possessed. The impression produced upon the mind by these two species of loss is widely different. The cessation of a gain is generally much less severely felt, than a loss to a corresponding amount. The gain which depends upon external circumstances is always precarious—it cannot be reckoned upon with certainty; on the other hand, if an individual have purchased an office with his own capital, he looks upon it as absolutely his own; it comes to be regarded as a certain, fixed, and permanent source of revenue, and as identified with his original property, upon which he has always reckoned.

When a man purchases an office, it may be fairly presumed that he possesses appropriate aptitude for the discharge of its duties. Are there pecuniary emoluments attached to an office, — the office may be accepted for the sake of these emoluments. Are there no pecuniary emoluments, — the office can be desired only on account of its duties, or of the natural rewards of honour and power which are inseparable from it. Such, at least, is the ordinary state of things. It is, however, possible that such an office might be desired as a means of obtaining some hidden profit prejudicial to the public: but this would be a

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particular case, whose existence ought to be established by proof.

It is not by names alone that we can determine whether it be most advantageous for the public, that offices should without emoluments be given away, or when with emoluments should be sold: this question can only be determined by an accurate account, exhibiting the balance of the sums paid and received. If, however, there be any offices without emoluments, for which purchasers can be found, — were it possible to sell purely honorary appointments, offices connected with public pomp and show, it would be entirely consistent with good economy: it would be to convert a tax upon honour, unfelt by any one, but established in favour of the purchasers, into hard cash. A tax would thus be levied upon vanity. The gain would be real, though the bargain, like that of the Lapland sorcerers, were only for bags of wind.

As it respects offices of which the emoluments are fixed, the question of economy is simple: the amount of the emoluments does not differ from a perpetual rent. But when an office is sold, the profits of which, whether received from the public or levied upon individuals, are uncertain in amount, this uncertainty causes a presumption against the economy of the bargain: it is disadvantageous to the public to be subject to uncertain expenses, and it is not probable that these uncertain profits will sell for so large a price as would willingly be paid for a salary equal to their average amount.

Again, as to emoluments derived solely from individuals. These are a species of tax often created and alienated at the same time in favour of the office. The general presumption cannot but be unfavourable to taxes imposed under such circumstances. In former times, when the science of political economy was in its cradle—when taxes and the methods of collecting them were little understood — governments have frequently thus alienated large branches of the public revenue: tempted by an immediate supply, they either did not or would not regard the extent of the sacrifices they made. The history of French finance is replete with instances of this kind. The customs of Orleans, which were originally purchased by a Duke of Orleans for 60,000 *francs*, afterwards yielded to his posterity a yearly revenue of more than 1,000,000 *francs*.

The venality of offices in that kingdom had created an exceedingly complex, and consequently exceedingly vicious, system. The sale of offices conferring hereditary nobility was especially mischievous, since this nobility enjoyed a multitude of exemptions. The nobles paid no taxes. Hence every creation of nobility was a tax, equal in value to the exemption granted, thrown upon those who continued liable to pay them.

Should the price for which an office is sold form a part of the emoluments of the head of the office, and not be received by the public, this would make no difference in the question of economy as respects giving and selling. That the produce of the sale is afterwards wasted, is an accident unconnected with the sale. The emoluments received by the head of the department may be too large or not: if not too large, the public gains by the operation; since, in suppressing the sale, it would be necessary to increase his emoluments by other means: if too large, the excess might be made applicable to the public service.

The Sale of Offices considered with respect to particular departments.

Public opinion is at present adverse to the sale of public offices. It more particularly condemns their sale in the three great departments of war, law, and religion. This prejudice has probably arisen from the improper use to which it has sometimes been applied; but whether this be the case or not, the use of the word *venal*, seldom if ever but in an odious and dysolgystic sense, has tended to preserve it.

"He who has bought the right of judging will sell judgments," is the sort of reasoning in use upon this subject. Instead of an argument, it is only an epigram.* The members of the French parliaments were judges, and they purchased their places; it did not by any means follow that they were disposed to sell their judgments, or that they could have done so with impunity. The greater number of these parliaments were never even suspected of having sold them. Countries may however be cited, in which the judges sell both justice and injustice, though they have not bought their places. The uprightness of a judge does not depend upon these, but upon other circumstances. If the laws be intelligible and known — if the proceedings of the judges are public — if the punishment for injustice surpass the profit to be reaped from it, judges will be upright, even though they purchase their offices.

In England, there are certain judicial offices which the judges sell—sometimes openly, sometimes clandestinely. The purchasers of these offices extract from the suitors as much as they can: if they had not purchased their places, they would not have endeavoured to extract less. The mischief is, not that this right of plundering is sold, but that the right exists.

* "Vendere jure potest, emerat ille prius." Apply the reasoning to another subject.: — "He who has bought apples, will sell apples." The consequence does not follow; for he may chance to eat or to give them away.

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In the English army, the system of venality has been adopted. Military commissions, from the rank of ensign to that of lieutenant-colonel, are sold, with permission to the purchasers to re-sell them. The epigram upon the judges is not applied here. The complaint is, that the patrimony of merit is invaded by wealth. But it ought to be recollected, that in this career the opportunities for the display of merit do not occur every day. It is only upon extraordinary occasions that extraordinary talents can be displayed; and when these occur, there can be no difficulty, even under this system, of bestowing proportionate and appropriate rewards. Besides, though the patrimony of merit should by this means be invaded by wealth, it would at the same time be defended from favouritism — a divinity in less esteem even than wealth. The circumstance which ought to recommend the system of venality to suspicious politicians is, that it diminishes the influence of the crown. The whole circle over which it extends is so much reclaimed from the influence of the crown. It may be called a corruption, but it serves as an antidote to a corruption more to be dreaded.

It is the sale of ecclesiastical offices which has occasioned the greatest outcry. It has been made a particular sin, to which has been given the name of *simony*. In the Acts of the Apostles, we are informed that at Samaria there was a magician named Simon, to whose gainful practices an immediate stop was put by the preaching and miracles of Philip, one of the deacons of the church of Jerusalem, who had been driven to Samaria by persecution. Simon, therefore, regarding Philip as a more fortunate rival, enrolled himself among the number of his proselytes, and when the apostles Peter and John came down from Jerusalem, and by the laying on of their hands communicated to the disciples the gift of the Holy Ghost, Simon, desirous of possessing something more than the rest, offered to them money, saying, "Give me also this power, that on whomsoever I lay hands, he may receive the Holy Ghost." Upon which Peter severely reprimanded him; and the magician, supple as he was intriguing, asked forgiveness — and thus his history closes. It is nowhere said that he was punished.

Upon the strength of this story, the Roman Catholic church has converted the act of buying or selling ecclesiastical benefices into a sin; and the English law, copying from the catholic church, has constituted such an act a crime. As the Roman Catholic church, among catholics, is infallible, as to them it must have decided rightly when it declared such acts to be sinful. Our subject, however, leads us only to the consideration of the legal crime: and between this crime and the offence of Simon Magus, there is nothing in common. Presentation to a living, and the reception of the Holy Ghost, are not the same things. If it be the object of this law to exclude improper persons, more direct, simple, and efficacious means might be employed: their qualifications might be ascertained by public examinations; their good conduct by the previous publication of their names, with liberty to all the world to object against them. Their moral and intellectual capacity being thus proved, why should they not be allowed to purchase the employment, or to discharge it gratuitously? An idiot, once admitted to priest's orders, may hold an ecclesiastical benefice; but were a man gifted like an apostle to give five guineas to be permitted to discharge the duties of that benefice, he would be borne down by the outcry against the simony he had committed.

What, then, is the effect of these anti-simoniacal laws? A priest may not purchase a benefice for himself; but his friend, whether priest or layman, may purchase it for him: He may not purchase the presentation to a vacant benefice; but he may purchase the right of presentation to a benefice filled by a dying man, or by a person in good health who will have the complaisance to resign, and receive it again with an obligation again to resign whenever his patron requires it. In reading these self-styled anti-simoniacal laws, it is difficult to discover whether they are intended to prohibit or to allow the practice of simony. Their only real effects are to encourage deception and fraud. Blackstone complains of their inexecution: he did not perceive that a law which is not executed is ridiculous.

CHAPTER X.

OF QUALIFICATIONS.

We have already seen that a salary may be employed as a means of insuring the responsibility of an individual, and as a moral antiseptic to preserve him from the influence of corruption. By the sale of offices, it has been seen that the actual expense of a salary may be diminished, and even reduced to nothing. It is therefore evident that the important circumstance is, that the individual should possess the requisite portion of the precious matter of reward, and not that it should have been given to him. If he possess it of his own, so much the better; and the more he already possesses, the less is it necessary to give him. In England, such are the attractions of power and dignity, that the number of candidates for their possession has been found so large, that it has been thought desirable to limit the selection to the number of those who possess the required quantity of this moral antiseptic; and this circumstance

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has given birth to what have been called *qualifications*.

The most remarkable and important offices to which these pecuniary qualifications have been attached, are those of justices of the peace and members of parliament. A justice of the peace ought to possess at least £100 per annum of landed property. There is no reasonable objection against this law. The office is one of those for which an ordinarily liberal education is sufficient. It is at the same time such an office, that the individual invested with it might do much mischief were he not restrained by powerful motives.

As a qualification for the more important office of member of parliament, the law requires of the member for a borough or city a similar qualification of £300 per annum, and of the member for a county of £600 per annum. This case differs widely from the other. Sufficient talent for carrying the laws into execution is possessed by a multitude of individuals; but few are able to determine what laws ought to be framed. The science of legislation is still in its cradle—it has scarcely been begun to be formed in the cabinets of philosophers: among legislators in name, scarcely any other practice can be found than that of children, who in their prattle copy what they have learned of their nurses. That a science may be learned, a motive is necessary; that the science of legislation may be learned, or rather may be created, motives so much the more powerful are necessary, as this science is most repulsive and thorny. For the pursuit of this study, an ardent and persevering mind is required, which can scarcely be expected to be formed in the lap of ease, of luxury, and of wealth. Among those whose wants have been forestalled from their cradle — among those who become legislators to gratify their vanity or relieve their ennui — there can scarcely be found one who could be called a legislator without mockery How shall he who possesses everything without the trouble of thinking, be led to subject himself to the labour of thought? If it be desirable that legislators should be men of enlarged and well-instructed minds, they must be sought among those who possess but little wealth — among those who, oppressed with their insignificance, are stimulated by ambition, and even by hunger, to distinguish themselves; they must be sought among those who possess the habits of Cyrus and not of Sardanapalus. Among the children of luxury, of whom the great mass of senators chosen by a rich people will always be composed, there are but few who will undergo the fatigue of studying the lessons which, at the expense of so much labour, have been furnished them by Beccaria and Adam Smith! Can it be expected, then, that from among their number the rivals of these great masters should be found? Qualifications in this case tend to exclude the individuals endowed with the greatest moral and intellectual capacity.

The reasons, however, in favour of qualifications are plausible. It is alleged, that the possession of a certain property tends to guarantee the independence of its possessor, and that in no other situation is independence more desirable than in that of a deputy appointed to watch over and defend the interests of the people against the encroachments of the executive power, supplied as that power almost necessarily is with so many means of seduction. To this it may be replied, that it is not the poor alone who are liable to be seduced: multitudes possessing property exceeding in value the qualifications required, are biassed by the seductive influence of places and pensions, whilst the poor remain unmoved.

A law of this nature, whose effect, were it strictly executed, would be to exclude the most capable, is made to be evaded, and in fact has constantly been evaded: among those who have acted the most conspicuous parts in the British House of Commons, many have been able to enter there only by an evasion of this law. Means might be provided which would afford a perfect guarantee against such evasions; but happily, upon this, as upon many other occasions, the veil that hides from human weakness the distant inconveniences of bad laws, hides also the means necessary for rendering such laws efficacious.

Some years ago, a member, the honesty of whose intentions could not be doubted, proposed to augment the qualifications for cities and boroughs from £300 to £600 per annum. The proposition, after having made considerable progress, fell to the ground. I know not whether this happened from a conviction of its trifling utility, or from one of those accidents which in that slippery path equally befall the most useful and most mischievous projects.

When the greatest possible freedom is given to popular suffrage, and even when no corrupt influence is used, the popular employment of wealth, being of all species of merit that of which people in general are best qualified to judge, and most disposed to esteem, there naturally exists an aristocracy of wealth. Is it desirable that this aristocracy should be rendered necessary and complete?

CHAPTER XI.

OF TRUST AND CONTRACT MANAGEMENT.

THE capacity of the individuals to discharge the duties required of them having been ascertained, and the most intimate connexion between their interest and the discharge of these duties having been established, the only desirable circumstance remaining is to reduce

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the amount of the emoluments to be paid for the discharge of these duties to the lowest term. Suppose the amount expended in the purchase of a given service to be a certain sum, and that an individual equally capable of rendering this service, should offer to render it at less expense: is there any good reason for refusing such an offer? I can discover none. The acceptance of such a proposition is the acceptance of a contract: the service thus agreed to be performed, is said to be contracted for, or let to farm. To this method, the mode of obtaining services by employing commissioners and managers, is opposed.

General reasonings upon this subject are insufficient to determine which of these two opposite systems will be most advantageous in any particular department: the nature of the service must be ascertained, before the question can be decided.

If we confine ourselves to general principles, contracts must be preferred to commissions. Under the system of contracts, the interests about which the individual is employed are his own; whilst, under the system of commissions, the interests about which he is employed remain the interests of the state; that is, the interests of another. In the first case, the sub-functionaries employed are the servants of an individual; in the other, they are the servants of the public — fellow-servants of those who are to watch over them. "But the servants of the most negligent master," says Adam Smith, "are better superintended than the servants of the most vigilant sovereign." If this cannot be admitted as an infallible rule, it is at least more frequently true than otherwise.

Public opinion is, however, but little favourable to the system of contracts. The savings which result to the state are forgotten, whilst the profits reaped by the farmers are recollected and exaggerated. Upon this subject, the ignorant and the philosopher — those who judge without thought, and those who pretend to have examined the subject — are nearly agreed. The objections which they bring forward against contractors (for they relate to individuals rather than to the system) are sufficiently specious.

I. *The contractors are rich.* If they are so, this is not the fault of the system, but of the conditions of the bargain made with them.

II. *The contractors are ostentatious and vain.* And if they burst with vanity, what then? Such inappreciable, or rather imaginary evils, cannot be brought into political calculations Their vanity will find a sufficient counterpoise and punishment in the vanity of those whom they incommode, whilst their ostentation will distribute their wealth among those whom it employs.

III. *The contractors excite envy.* This is the fault of those who are envious, and not of the contractors: it is another imaginary evil, in opposition to which may be placed the pleasure of detraction. Besides, if the contracts are open to all, unless improvident bargains are made through favour, corruption, or ignorance, rapid fortunes will not often be accumulated by contractors: should they still become rich, it will be because they have deserved it.

IV. *Contractors never find the laws too severe to insure the collection of the taxes for which they have contracted. They will procure severe and sanguinary laws to be enacted.* If the laws are severe and sanguinary, the legislature is in fault, and not the contractors. Whether the taxes are managed by contractors or commissioners, it is equally proper that the most efficacious system of laws for their collection should be established; and certainly severe and sanguinary laws are not the most efficacious. Contractors, therefore, are not likely to seek the enactment of the most severe laws: there are many reasons for supposing the contrary will be the case. The better the law is executed, that is to say, the more certainly punishment follows the transgression of the law, the less severe need it be. But under the inspection of the contractor, who has so strong an interest in its execution, the law has a better chance of being put in execution, than when under the inspection of a commissioner who has so little, if any, interest in the matter. Upon this point it is impossible to imagine by what means two interests can be more intimately connected, than those of the contractor and the state. It is the interest of the contractor that all who illegally evade the payment of the taxes should be punished: this also is the interest of the state. But it can never be the interest of the contractor to punish the innocent: this would tend to excite the whole people against him. Of every species of injustice, this is one which is least likely to meet with tranquil and acquiescent spectators.

Adam Smith, who has adopted all these objections, little calculated as they seem to me to appear in such a work as his, also contends that "the best and most frugal way of levying a tax, can never be by farm." * If this were true, it would be a conclusive reason against ever letting taxes to farm, and it would be useless to seek for others. When a fact is proved, it is useless to trouble one's self with prejudices and probabilities.

It is true, that without the hope of gain, no contractor would undertake to collect the produce of a tax, and to make the advances required. But whence ought the profit of the farmer to rise? This is what Adam Smith has not examined. He supposes that the state would make the same profit, by

* Wealth of Nations, book v. ch. ii.

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establishing an administration under its own inspection. The truth of this supposition is altogether doubtful. The personal interest of a minister is to have as many individuals, that is to say, as many dependants, employed under him as possible — that their salaries should be as large as possible; and he will lose nothing by their negligence. The interest of the farmer, or contractor, is to have as few individuals employed under him as possible, and to pay each one no more than he deserves; and he will lose by every instance of their negligence. In these circumstances, though no greater amount should be received from the people than would have been collected by the state, a contractor might reasonably hope to find a source of profit.

Adam Smith has attacked, with as much force as reason, the popular prejudices against the dealers in corn, so odious and so much suspected under the name of forestallers. He has shown that the interest of the public is most intimately connected with the natural, and almost necessary, interests of this suspected class of merchants. He might with equal justice have extended his protection to farmers of the public revenue, a class of men nearly as little beloved.

In every branch of politics, and especially in so wide a field as his subject embraced, it was nearly impossible that he should examine everything with his own eyes: it was almost of necessity that he was sometimes guided by general opinion. This seems to me to have happened upon this occasion. He forgot in this instance to apply the principle already cited, and of which he had elsewhere made such beautiful applications. I had myself once written an essay against farmers of the revenue; I have thrown it into the fire, for which alone it was fit. I know not how long I should have retained the opinions it advocated, had I not been better instructed by Adam Smith.

Note.—In Burgoyne's "Picture of Spain," vol. ii. page 4, &c. it is stated, that in that country, trust was found more economical than contract management. But he does not state in what manner contracts were granted: whether favour or corruption did not preside at their disposal; whether the trust management had not superior means of enforcing the payment of the taxes; nor whether their increased produce was not, in part at least, owing to the increase of trade and wealth.

CHAPTER XII.

OF REFORMS.

THE emoluments annexed to any office being shown to be in excess, and the mischiefs resulting from such an excess being ascertained, the next question which occurs is, What remedy ought to be applied? The most obvious answer is a short one: Strike them off at once. But thus unqualified, this answer is far from being the proper one.

Reform is the practical conclusion expected as the reward for all the labour bestowed on the examination of these theoretic propositions. Upon this subject, nothing farther remains but to point out one limitation, without which every reform can only be a greater abuse than the whole of those which it pretends to correct. This limitation is, *that no reform ought to be carried into effect without granting complete indemnity to those whose emoluments are diminished, or whose offices are suppressed;* — in a word, that the only legitimate benefit to be derived by the public from economical reform, consists in the conversion of perpetual into life annuities.

Will it be said, that the immediate suppression of these offices would be a gain to the public? This would be a mere sophism. The sum in question would, without doubt, be gained by the public, if it came from abroad, if it were obtained by commerce &c.; but it is not gained when it is taken from individuals who form a part of that same public. Would a family be richer, because the father disinherited one of his children, that he might the more richly endow the others? In this instance, as the disinheriting of one child would increase the inheritance of the others, the mischief would not be without some countervailing advantage; it would be productive of good to some part of the family. But when it relates to the public, the emoluments of a suppressed place being divided amongst the whole community,—the gain, being distributed among a multitude, is divided into impalpable quantities; whilst the loss, being confined to one, is felt in its entirety by him who supports it alone. The result of the operation is in no respect to enrich the party who gains, whilst it reduces the party who loses to poverty. Instead of one place suppressed, suppose a thousand, or ten thousand, or a hundred thousand,—the total disadvantage will remain the same: the plunder taken from thousands will have to be distributed among millions; your public places will be filled with unfortunate citizens whom you will have plunged into indigence, whilst you will scarcely see one individual who is sensibly enriched in consequence of all these cruel operations. The groans of sorrow and the cries of despair will resound on every side; the shouts of joy, if any such are heard, will not be the expressions of happiness, but of that malevolence which rejoices in the agony of its victims.

By what means do individuals deceive themselves and others into the sanction of

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such mischievous acts? It is by having recourse to certain vague maxims, consisting of a mixture of truth and falsehood, and which give to a question, in itself simple, an appearance of deep and mysterious policy. The interest of individuals, it is said, must give way to the public interest. But what does this mean? Is not one individual as much a part of the public as any other? This public interest, which is thus personified, is only an abstract term; it only represents the aggregate of individual interests: they must all be taken into the account, instead of considering a part as the whole, and the rest as nothing. If it were proper to sacrifice the fortune of one individual to augment that of the others, it would be still more desirable to sacrifice a second and a third, and so on to any greater number, without the possibility of assigning limits to the operation; since, whatever number may have been sacrificed, there still remains the same reason for adding one more. In a word, the interest of the first is sacred, or the interest of no one can be so.

The interests of individuals are the only real interests. Take care of individuals;—never molest them—never suffer them to be molested, and you have done enough for the public.

Among the multiplicity of human affairs, individuals have often been injured by the operation of particular laws, without daring to complain, or without being able to obtain a hearing for their complaints, on account of this vague and false notion, that the interest of individuals ought to give way to the public interest. Considered as a question of generosity, by whom ought this virtue to be displayed? By all towards one—or by one towards all? Which, then, is the most selfish—he who would preserve what he already possesses—or he who would seize, even by force, what belongs to another?

An evil felt, and a good unfelt,—such is the result of those magnificent reforms, in which the interests of individuals are sacrificed to those of the public.

The principles here laid down, it may be said, are applicable to offices and pensions held *for life*, but not to offices and pensions held *during pleasure*, and which consequently may be revoked at any time. May not these be reformed at any time? No: the difference between the two is only verbal. In all those cases in which it has been customary for those places which are granted *during pleasure* to be held for life, though the possessor may have been led to expect other causes of removal, he has never expected this. "My superior," he has said to himself, "may dismiss me, I know; but I flatter myself I shall never deserve to be dismissed; I shall therefore retain my office for life." Hence the dismission of such an individual without indemnity, is as great an evil, as much unforeseen, and equally unjust, as in the former case.

To these reasons, arising from justice and humanity, may be added a prudential consideration. By such indemnification, the interests of individuals and the public are reconciled, and a better chance of securing the latter is obtained. Assure those who are interested that they shall not be injured,—they will be among the foremost in facilitating reforms. By thus removing the grand obstacle of contrary interests, the politician prevents those clandestine intrigues, and private solicitations, which so often arrest the progress of the noblest plans.

It was thus that Leopold, the Grand Duke of Tuscany, proceeded. "Notwithstanding the multitude of reforms introduced by his Royal Highness since his accession to the throne, there has not been a single office reformed in Tuscany, the holder of which has not either been placed in some other office, [*equal to that suppressed, must be understood*] or who has not received as a pension a salary equal in value to the emoluments of his office."* Upon such conditions, the pleasure of reform is pure: nothing is hazarded; good only is accomplished; at least the principal object is secured, and the happiness of no one is interrupted.

* "Indication Sommaire des Réglemens de Léopold, Grand Duc de Toscane." Bruxelles, 1778.

BOOK III.—REWARD APPLIED TO ART AND SCIENCE.

CHAPTER I.

ART AND SCIENCE—DIVISIONS.

A cloud of perplexity, raised by indistinct and erroneous conceptions, seems at all times to have been hanging over the import of the terms *art* and *science*. The common supposition seems to have been, that in the whole *field of thought* and *action*, a determinate number of existing compartments are assign-

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able, marked out all round, and distinguished from one another by so many sets of natural and determinate boundary lines: that of these compartments some are filled, each by an *art*, without any mixture of science; others by a *science*, without any mixture of art; and others, again, are so constituted, that, as it has never happened to them hitherto, so neither can it ever happen to them in future, to contain in them any thing *either* of art *or* science.

This supposition will, it is believed, be found in every part erroneous: as between *art* and *science*, in the whole field of *thought* and *action*, no one spot will be found belonging to either to the exclusion of the other. In whatsoever spot a portion of either is found, a portion of the other may be also seen; whatsoever spot is occupied by either, is occupied by both — is occupied by them in *joint tenancy*. Whatsoever spot is thus occupied, is so much taken out of the *waste;* and there is not any determinate part of the whole waste which is not liable to be thus occupied.

Practice, in proportion as *attention* and *exertion* are regarded as necessary to due *performance*, is termed *art*. *Knowledge*, in proportion as *attention* and *exertion* are regarded as necessary to *attainment*, is termed *science*.

In the very nature of the case, they will be found so combined as to be inseparable. Man cannot *do* anything well, but in proportion as he *knows* how to *do* it: he cannot, in consequence of *attention* and *exertion*, *know* anything but in proportion as he has practised the *art* of *learning* it. Correspondent, therefore, to every *art*, there is at least one branch of *science;* correspondent to every branch of *science*, there is at least one branch of *art*. There is no determinate line of distinction between *art* on the one hand, and *science* on the other; no determinate line of distinction between *art* and *science* on the one hand, and *unartificial practice* and *unscientific knowledge* on the other. In proportion as that which is seen to be *done*, is more conspicuous than that which is seen or supposed to be *known*, — that which has place is apt to be considered as the work of *art:* in proportion as that which is seen or supposed to be *known*, is more conspicuous than anything else that is seen to be *done*, — that which has place is apt to be set down to the account of *science*. Day by day, acting in conjunction, art and science are gaining upon the abovementioned waste — the field of *unartificial practice* and *unscientific knowledge*.* Taken collectively, and considered in their connexion with the happiness of society, the arts and sciences may be arranged in two divisions; viz. — 1. Those of amusement and curiosity; 2. Those of utility, immediate and remote. These two branches of human knowledge require different methods of treatment on the part of governments.

By arts and sciences of amusement, I mean those which are ordinarily called the *fine arts;* such as music, poetry, painting, sculpture, architecture, ornamental gardening, &c. &c. Their complete enumeration must be excused: it would lead us too far from our present subject, were we to plunge into the metaphysical discussions necessary for its accomplishment. Amusements of all sorts would be comprised under this head.

Custom has in a manner compelled us to make the distinction between the arts and sciences of amusement, and those of curiosity. It is not, however, proper to regard the former as destitute of utility: on the contrary, there is nothing, the utility of which is more incontestable. To what shall the character of utility be ascribed, if not to that which is a source of pleasure? All that can be alleged in diminution of their utility is, that it is limited to the excitement of pleasure: they cannot disperse the clouds of grief or of misfortune. They are useless to those who are not pleased with them: they are useful only to those who take pleasure in them, and only in proportion as they are pleased.

By arts and sciences of curiosity, I mean those which in truth are pleasing, but not in the same degree as the fine arts, and to which at the first glance we might be tempted to refuse this quality. It is not that these arts and sciences of curiosity do not yield as much pleasure to those who cultivate them as the fine arts; but the number of those who study them is more limited. Of this nature are the sciences of heraldry, of medals, of pure chronology — the knowledge of ancient and barbarous languages, which present only collections of strange words, — and the study of antiquities, inasmuch as they furnish no instruction applicable to morality, or any other branch of useful or agreeable knowledge.

The utility of all these arts and sciences, — I speak both of those of amusement and curiosity, — the value which they possess, is exactly in proportion to the pleasure they yield. Every other species of pre-eminence which may be attempted to be established among them is altogether fanciful. Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more pleasure, it is more valuable than either. Everybody can play at push-pin: poetry and music are relished only by a few. The game of push-pin is always innocent: it were well could the same be always asserted of poetry. Indeed, between poetry and truth there is a natural opposition: false morals, fictitious nature. The poet always stands in need of

* The foregoing paragraphs are extracted from Bentham's "*Chrestomathia*," Part I.

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something false. When he pretends to lay his foundations in truth, the ornaments of his superstructure are fictions; his business consists in stimulating our passions, and exciting our prejudices. Truth, exactitude of every kind, is fatal to poetry. The poet must see everything through coloured media, and strive to make every one else to do the same. It is true, there have been noble spirits, to whom poetry and philosophy have been equally indebted; but these exceptions do not counteract the mischiefs which have resulted from this magic art. If poetry and music deserve to be preferred before a game of push-pin, it must be because they are calculated to gratify those individuals who are most difficult to be pleased.

All the arts and sciences, without exception, inasmuch as they constitute innocent employments, at least of time, possess a species of moral utility, neither the less real or important because it is frequently unobserved. They compete with, and occupy the place of those mischievous and dangerous passions and employments, to which want of occupation and ennui give birth. They are excellent substitutes for drunkenness, slander, and the love of gaming.*

The effects of idleness upon the ancient Germans may be seen in Tacitus. His observations are applicable to all uncivilized nations: for want of other occupations they waged war upon each other — it was a more animated amusement than that of the chase. The chieftain who proposed a martial expedition, at the first sound of his trumpet ranged under his banners a crowd of idlers, to whom peace was a condition of restraint, of languor, and of ennui. Glory could be reaped only in one field — opulence knew but one luxury. This field was that of battle — this luxury that of conquering or recounting past conquests. Their women themselves, ignorant of those agreeable arts which multiply the means of pleasing, and prolong the empire of beauty, became the rivals of the men in courage, and, mingling with them in the barbarous tumult of a military life, became unfeeling as they.

It is to the cultivation of the arts and sciences, that we must in great measure ascribe the existence of that party which is now opposed to war: it has received its birth amid the occupations and pleasures furnished by the fine arts. These arts, so to speak, have enrolled under their peaceful banners that army of idlers which would have otherwise possesssd no amusement but in the hazardous and bloody game of war.

Such is the species of utility which belongs indiscriminately to all the arts and sciences. Were it the only reason, it would be a sufficient reason for desiring to see them flourish and receive the most extended diffusion.

If these principles are correct, we shall know how to estimate those critics, more ingenious than useful, who, under pretence of purifying the public taste, endeavour successively to deprive mankind of a larger or smaller part of the sources of their amusement. These modest judges of elegance and taste consider themselves as benefactors to the human race, whilst they are really only the interrupters of their pleasure — a sort of importunate hosts, who place themselves at the table to diminish, by their pretended delicacy, the appetite of their guests. It is only from custom and prejudice that, in matters of taste, we speak of false and true. There is no taste which deserves the epithet *good*, unless it be the taste for such employments which, to the pleasure actually produced by them, conjoin some contingent or future utility: there is no taste which deserves to be characterized as bad, unless it be a taste for some occupation which has a mischievous tendency.

The celebrated and ingenious Addison has distinguished himself by his skill in the art of ridiculing enjoyments, by attaching to them the fantastic idea of *bad taste*. In the *Spectator* he wages relentless war against the whole generation of *false* wits. Acrostics, conundrums, pantomimes, puppet-shows, *bouts-rimés*, stanzas in the shape of eggs, of wings, burlesque poetry of every description — in a word, a thousand other light and equally innocent amusements, fall crushed under the strokes of his club. And, proud of having established his empire above the ruins of these literary trifles, he regards himself as the legislator of Parnassus! What, however, was the effect of his new laws? They deprived those who submitted to them, of many sources of pleasure — they exposed those who were more inflexible, to the contempt of their companions.

Even Hume himself, in spite of his proud and independent philosophy, has yielded to this literary prejudice. "By a single piece," says he, "the Duke of Buckingham rendered a great service to his age, and was the reformer of its taste!" In what consisted this important service? He had written a comedy, *The Rehearsal*, the object of which was to render those theatrical pieces which had been most popular, the objects of general distaste. His satire was completely successful; but what was its fruit? The lovers of that species of amusement were deprived of so much pleasure; a multitude of authors, covered with ridicule and contempt, deplored, at the same time, the loss of their reputation and their bread.

As the amusement of a minister of state,

* *Principles of Penal Law*, Part III. *Of Indirect Methods of preventing Crimes*, Vol. I. p. 533.

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it must be confessed that a more suitable one might be found than a game at *solitaire*. Still, among the number of its amateurs was once found Potemkin, one of the most active and respected Russian ministers of state. I see a smile of contempt upon the lips of many of my readers, who would not think it strange that any one should play at cards from "eve till morn," provided it were in company. But how incomparably superior is this solitary game to many social games — so often anti-social in their consequences! The first, a pure and simple amusement, stripped of everything injurious, free from passion, avarice, loss, and regret. It is gaming enjoyed by some happy individuals, in that state in which legislators may desire, but cannot hope that it will ever be enjoyed by all throughout the whole world. How much better was this minister occupied, than if, with the Iliad in his hand, he had stirred up within his heart the seeds of those ferocious passions which can only be gratified with tears and blood.

As men grow old, they lose their relish for the simple amusements of childhood. Is this a reason for pride? It may be so — when to be hard to please, and to have our happiness dependent on what is costly and complicated, shall be found to be advantageous. The child who is building houses of cards is happier than was Louis XIV. when building Versailles. Architect and mason at once, master of his situation and his materials, he alters and overturns at will.

"Diruit, edificat, mutat quadrata rotundis;"

and all this at the expense neither of groans nor money. The proverbial expression of the *games of princes*, may furnish us with strong reasons for regretting that princes should ever cease to love the *games of children*.

A reward was offered by one of the Roman emperors to whoever would invent a new pleasure; and because this emperor was called *Nero*, or *Caligula*, it has been imputed to him as a crime: as if every sovereign, and even every private individual, who encourages the cultivation of the arts and sciences, were not an accomplice in this crime. The employment of those critics, to whom we have before referred, tends to diminish the existing stock of our pleasures: the natural effect of increasing years, is to render us insensible to those which remain: by those who blame the offer of the Roman emperor, these critics should be esteemed the benefactors of mankind, and old age the perfection of human life.

In league with these critics are the tribe of satirists — those generous men, who without other reward than the pleasure of humbling and disfiguring everything which does not please them, have constituted themselves reformers of mankind! The only satire I could read without disgust and aversion, would be a satire on these libellers themselves. Their occupation consists in fomenting scandal, and in disseminating its poisons throughout the world, that they may be furnished with pretexts for pouring contempt upon everything that employs or interests other men. By blackening everything and exaggerating everything (for it is by exaggeration they exist) they deceive the judgments of their readers: — innocent amusements, ludicrous eccentricities, venial transgressions and crimes, are alike confounded and covered with their venom. Their design is to efface all the lines of demarcation, all the essential distinctions which philosophy and legislation have with so much labour traced. For one truth, we find a thousand odious hyperboles in their works. They never cease to excite malevolence and antipathy: under their auspices, or at least under the influence of the passions which animate them, language itself becomes satirical. Neutral expressions can scarcely be found to designate the motives which determine human actions: to the words expressive of the motive, such as *avarice, ambition, pride, idleness*, and many others, the idea of disapprobation is so closely, though unnecessarily, connected, that the simple mention of the motive implies a censure, even when the actions which have resulted from it have been most innocent. The nomenclature of morals is so tinctured with these prejudices, that it is not possible, without great difficulty and long circumlocutions, simply and purely, without reprobation or approbation, to express the motives by which mankind are governed. Hence our languages, rich in terms of hatred and reproach, are poor and rugged for the purposes of science and of reason. Such is the evil created and augmented by satiric writers.*

Among rich and prosperous nations, it is not necessary that the public should be at the expense of cultivating the arts and sciences of amusement and curiosity. Individuals will always bestow upon these that portion of reward which is proportioned to the pleasure they bestow.

Whilst as to the arts and sciences of immediate and those of more remote utility, it would not be necessary, nor perhaps possible, to preserve between these two classes an exact line of demarcation, the distinctions of theory and practice are equally applicable to all. Considered as matter of theory, every art or science, even when its practical utility is most immediate and incontestable, appears to retire into the division of arts and sciences of remote utility. It is thus that medicine and legislation, arts so truly practical, considered under a particular aspect, appear equally remote in respect to their utility with the spe-

* See further on this subject, in the "*Table of Springs of Action*," Vol. I. p. 195.

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culative sciences of logic and mathematics. On the other hand, there is a branch of science for which, at first, a place would scarcely have been found among the arts and sciences of curiosity, but which, cultivated by industrious hands, has at length presented the characters of immediate and incontestable utility. — Electricity, which, when first discovered, seemed destined only to amuse certain philosophers by the singularity of its phenomena, has at length been employed with most striking success in the service of medicine, and in the protection of our dwellings against those calamities, for which ignorant and affrighted antiquity could find no sufficient cause but the special anger of the gods.

That which governments ought to do for the arts and sciences of immediate and remote utility, may be comprised in three things — 1. To remove the discouragements under which they labour; 2. To favour their advancement; 3. To contribute to their diffusion.

CHAPTER II.

ART AND SCIENCE — ADVANCEMENT.

Though discoveries in science may be the result of genius or accident, and though the most important discoveries may have been made by individuals without public assistance, the progress of such discoveries may at all times be materially accelerated by a proper application of public encouragement. The most simple and efficacious method of encouraging investigations of *pure theory*—the first step in the career of invention, consists in the appropriation of specific funds to the researches requisite in each particular science.

It may, at first sight, appear superfluous to recommend such a measure as this, since there are few states which have not sometimes made such appropriations, and since all governments, in proportion as they have become enlightened, have been more and more disposed to reckon such expenses necessary. The most efficacious methods of employing the large funds which ought thus to be appropriated, remain, however, to be examined.

It would be necessary that the funds applicable to a given science — chemistry, for example — should be confided to the students of chemistry themselves. They ought, however, to be bestowed in the shape of reward. Thus the chemist, who upon a given subject should have produced the best theoretic dissertation, might be put into possession of these funds, upon condition that he should employ them in making the experiments which he had pointed out. What more natural or useful reward could be conferred upon a philosopher, than thus to be enabled, with honour to himself, to satisfy a taste or a passion which the insufficiency of his own fortune would have rendered rather a torment than a pleasure? His talents are rewarded by giving him new means of increasing them. Other rewards often have a contrary effect: they tend to distract his attention, and to give birth to opposite tastes.

If this method of encouraging theoretic researches has been neglected, it has been because the intimate connexion between the sciences and arts — between theory and practice — has only been well understood by philosophers themselves; the greater number of men recognise the utility of the sciences only at a moment when they are applied to immediate use. The ignorant are always desirous of humbling the wise; gratifying their self-love, by accusing the sciences of being more curious than useful. "All your books of natural history are very pretty," said a lady to a philosopher, "but you have never saved a single leaf of our trees from the teeth of the insects." Such is the frivolous judgment of the ignorant. There are many discoveries which, though at first they might seem useless in themselves, have given birth to thousands of others of the greatest utility. It is in conducting the sciences to this point, that encouragements might thus be advantageously employed, instead of being bestowed in what are generally called rewards. When the discoveries of science can be practically employed in the increase of the mass of general wealth, they receive a reward naturally proportioned to their utility: it is therefore for such discoveries as are not thus immediately applicable, that reward is most necessary. Of this nature are most of the discoveries of chemistry. Is a new earth discovered? — a new air — a new salt — a new metal? The utility of the discovery is at first confined to the pleasure experienced by those interested in such researches. This ordinarily is all the benefit reaped by the discoverer: occupied in making further discoveries, he leaves it to others to reap their fruits. It is those who follow him, who apply them to the purposes of art, and levy contributions upon the individuals, who are desirous of enjoying the fruits of his labour. Ought the master workman, who sees no particular individual upon whom he may levy a contribution, therefore to go without reward?

CHAPTER III.

ART AND SCIENCE — DIFFUSION.

The sciences, like plants, may expand in two directions — in superficies and in height. The superficial expansion of those sciences which are most immediately useful, is most to be desired. There is no method more calculated to accelerate their advancement, than their

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general diffusion: the greater the number of those by whom they are cultivated, the greater the probability that they will be enriched by new discoveries. Fewer opportunities will be lost, and greater emulation will be excited in their cultivation.

Suppose a country divided into districts, somewhat similar to the English counties, but more equal in size, say from thirty to forty miles in diameter,— the following is the system of establishments which ought to be kept up in the central town of each district:—

1. A professor of medicine.
2. A professor of surgery and midwifery.
3. An hospital.
4. A professor of the veterinary art.
5. A professor of chemisty.
6. A professor of mechanical and experimental philosophy.
7. A professor of botany and experimental horticulture.
8. A professor of the other branches of natural history.
9. An experimental farm.

The first advantage resulting from this plan would be the establishment, in each district, of a practitioner skilled in the various branches of the art of healing. An hospital, necessary in itself, would also be further useful by serving as a school for the students of this art.

The veterinary art, or the art of healing as applied to animals, has only within these few years been separately studied in England. The farriers who formerly practised upon our cattle, were generally no better qualified for their duty than the old women whom our ancestors allowed to practise upon themselves. The establishment of a professor of the veterinary art in every district might even be recommended as a matter of economy: the value of the cattle preserved would more than counterbalance the necessary expense. This professorship might, for want of sufficient funds, be united to one of the others.

The connexions of chemistry with domestic and manufacturing economy are well known. The professor of this science would of course direct his principal attention to the carrying this practical part to its greatest perfection. His lectures would treat of the business of the dairy; the preservation of corn and other agricultural productions; the preservation of provisions of all sorts; the prevention of putrefaction, that subtle enemy of health as well as of corruptible wealth; the proper precautions for guarding against poisons of all sorts, which may so easily be mingled with our provisions, or which may be collected from the vessels in which they are prepared. They would also treat of the various branches of trade — of the arts of working in metal, of breweries, of the preparation of leather, and the manufactures of soap and candles, &c. &c.

Botany, to a certain degree, is necessary in the science of medicine: it supplies a considerable part of the materials employed. It has a similar connexion with chemistry, and the arts which depend upon it. The combined researches of the botanist and chemist would increase our knowledge of the various uses to which vegetable substances might be applied. It is to them that we must look for the discovery of cheaper and better methods, if such methods are to be found, of giving durability and tenacity to hemp and flax for the manufacture of linens, ropes, and paper; for discoveries respecting the astringent matters applicable to the preparation of leather; and for the invention of new dyes, &c.; and so on, to infinity. Indeed, it is the botanist who must enable the agriculturist to distinguish the most useful and excellent herbs and grasses, from those which are less useful, or pernicious.

The professor of natural history would also furnish abundance not only of curious but useful information. He would teach the cultivator to distinguish, throughout all the departments of the animal kingdom, his allies from his enemies. He would point out the habits and the different shapes assumed by different insects, and the most efficacious methods of destroying them, and preventing their ravages. It might, however, perhaps appear, were we fully acquainted with the history of all the animals which dwell with us upon the surface of this planet, that there would be found none whose existence was to us a matter of indifference.

I have placed in the last rank the institution of an experimental farm — not because its utility would be inferior to all the others, but because its functions may be easily supplied by individual industry. In a country so well replenished with knowledge, wealth, and zeal, as England, there is no district which could not furnish an abundance of experiments in this department. Little more would be necessary than to provide a register into which they might be collected, and in which they might receive the degree of publicity necessary for displaying their utility. Such a register England once possessed in the work of the enlightened and patriotic Arthur Young. Such a register, numerous and excellent as the hints dispersed throughout it were, was far, however, from supplying the place, and rendering useless a system of regular and connected researches, in which instruction should constitute the sole object.*

In enumerating the branches of knowledge with which, on account of their superior uti-

* *The Board of Agriculture*, which at the solicitation of Sir John Sinclair was formed during the administration of Mr. Pitt, was designed to carry purposes similar to those recommended above into effect.

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lity, it is most desirable that the great mass of the people should be acquainted, it may well be supposed that I ought not to forget the knowledge of the laws. But that this knowledge may be diffused, a determinate system of cognoscible laws, capable of being known, is necessary. Unhappily, such a system does not yet exist: whenever it shall come to be established, the knowledge of the laws will hardly be considered worthy of the name of science. The legislator who allows more intelligible terms to exist within the compass of language, than those in which he expresses his laws, deserves the execration of his fellow-men. I have endeavoured to present to the world the outlines of a system,* which, should it ever be filled up, I flatter myself would render the whole system of laws cognoscible and intelligible to all.

As to those arts and sciences which may be learned from books, — such as the art of legislation, history in all its branches, moral philosophy and logic, comprehending metaphysics, grammar, and rhetoric, — these may be left to be gathered from books. Those individuals who are desirous of alleviating the pains of study by the charms of declamation upon these subjects, may be permitted to pay for their amusements. There is, however, one branch of encouragement, which the hand of government might extend even to these studies. It might establish in each district, in which the lectures of which we have already spoken, should be delivered, an increasing library, appropriated to these studies. This would be at once to bestow upon students the instruments of study, and upon authors their most appropriate reward.

I should not consider knowledge in these departments, at once so useful and so curious, ill acquired, were it even acquired at the expense of Latin and Greek — an acquaintance with which is held in such high estimation in our days, and for instruction in which the foundations are so abundant. Common opinion appears to have considered the sciences more difficult of attainment than these dead languages. This opinion is only a prejudice, arising from the comparatively small number of individuals who apply themselves to the study of the sciences, and from its not having been the custom to study them till the labour of these other studies has been completed. But, custom and prejudice apart, it is in the study of the sciences that young people would find most pleasure and fewest difficulties. In this career, ideas find easy access through the senses to the memory and the other intellectual faculties. Curiosity, that passion which even in infancy displays so much energy, would here be continually gratified. In the study of language, on the contrary, all is abstraction: there are no sensible objects to relieve the memory; all the energy of the mind is consumed in the acquisition of words, of which neither the utility nor the application is visible. Hence, the longest and most detailed course of instruction which need be given upon all the sciences before mentioned, would not together occupy so much time as is usually devoted to the study of Latin, which is forgotten almost as soon as learned. The knowledge of languages is valuable only as a means of acquiring the information which may be obtained from conversation or books. For the purposes of conversation, the dead languages are useless; and translations of all the books contained in them may be found in all the languages of modern Europe. What, then, remains to be obtained from them, not by the common people, but even by the most instructed? I must confess, I can discover nothing but a fund of allusions wherewith to ornament their speeches, their conversations, and their books — too small a compensation for the false and narrow notions which custom continues to compel us to draw from these imperfect and deceptive sources. To prefer the study of these languages to the study of those useful truths which the more mature industry of the moderns has placed in their stead, is to make a dwelling-place of a scaffolding, instead of employing it in the erection of a building: it is as though, in his mature age, a man should continue to prattle like a child. Let those who are pleased with these studies continue to amuse themselves; but let us cease to torment children with them, at least those children who will have to provide for their own subsistence, till such time as we have supplied them with the means of slaking their thirst for knowledge at those springs where pleasure is combined with immediate and incontestable utility.

It is especially by a complete course of instruction, that the clergy, who might be rendered so useful, ought to be prepared for their functions. Within the narrow limits of every parish, there would then be found one man at least well instructed upon all subjects with which acquaintance is most desirable. In exchange for this knowledge, which constitutes the glory of man, I would exchange as much as might be desired of that controversy which is his scourge and his disgrace.

The intervals between divine service on the Sabbath might then be filled up by the communication of knowledge to those whose necessary avocations leave them no other leisure time for improvement. An attendance upon a course of physico-theology, it appears to me, would be a much more suitable mode of employing this time, than wasting it in that idleness and dissipation in which both health and money are so frequently lost.

* See *An Introduction to Principles of Morals and Legislation*, Vol. I.

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There are three causes which tend to strengthen an attachment to the dead languages:—The first is, the utility which they formerly possessed. At the revival of letters, there was nothing to learn but Latin and Greek, and nothing could be learnt but by Latin and Greek. The period when this utility ceased having never been fixed, custom has led us to regard it as still subsisting.

A second reason is, the time and trouble expended by so many persons in learning them.

The price of anything is regulated not only by its utility, but also by the labour expended in procuring it. Few would be willing to acknowledge that they had spent a large portion of their life in learning that which, when learnt, was not worth knowing. There are many individuals who have learnt Latin and Greek, but have learned nothing else. Can it be expected that they should acknowledge these languages are useless? As well might a knight-errant have been expected to acknowledge that his mistress was ugly!*

The third cause is, their reputed necessity. This necessity, though purely conventional, is not the less real. Public opinion has attached a degree of importance to an acquaintance with them, and he who should be known to be entirely ignorant of them, would be branded with disgrace. So long as this law subsists, it must be obeyed. A single individual is seldom able to withstand or change the laws established by public opinion.

As the public mind becomes enlightened, these laws will change of themselves. A sovereign may, however, hasten these changes if he believe them useful, and if he consider the attempt worth the trouble. He may reward individuals for teaching the arts and sciences, and thus establish a new public opinion, which shall at first compete with, and at length ultimately subdue, the previous prejudice.

He may also attain the same end by another less costly, but more startling method. He may prescribe an attendance upon different scientific lectures, as a necessary condition to the holding of certain offices, and particularly of all honorary employments. To those who have completed their course of attendance, an honorary diploma may be given, which upon all occasions of public ceremony shall entitle those who possess it to a certain precedence.

In the times of feudal barbarism, when war was the only occupation of those who did not belong to the commonality or the clergy, the upper ranks in society were necessarily military. The knight was the warrior who could afford to fight on horseback; the squire was one who, not being so rich as the knight, could afford to be his principal attendant: and this constituted their nobility.

In future times, when other occupations shall be pursued and other manners established, it is possible that knowledge may confer rank in Europe, as the appearance of it has for a long time past in China. Wealth, independently of any convention, possesses real power, and will always mingle with everything which tends to confer respect. The philosopher, to his title of honour, will unite the idea of an individual sufficiently wealthy to have supported the expense of a learned education. Knowledge, whether true or presumptive, might thus become a mark of distinction, as the length of the nails is in China.

But it may be said, that something more than attendance upon a course of scientific lectures is necessary, if anything is to be learned; and that the law which should bestow honour upon attendance would not insure study. If it were necessary to have a nobility composed of real philosophers, other methods must be pursued; but when the object in view is merely to change the species of knowledge in which they are to be instructed, from what is useless to what is useful, what more need be required? When interesting objects of study are substituted for those which are uninteresting, they would not study less.

I know that public examinations are powerful means for exciting emulation, but I have no desire to place additional obstacles in the

* "En effet, la plupart de ces savans ne sentent plus les choses en elles-mêmes. Ils sont comme ces imaginations faibles, qui, subjuguées par l'éclat des dignités et des richesses, admirent dans la bouche d'un grand ce qu'ils trouveraient pitoyable dans celle d'un homme du commun. Ainsi, l'ancienne réputation et les langues savantes leur imposent, et changent tout à leurs yeux. Telle pensée qu'ils entendent tout les jours en François sans y prendre garde, les enleve s'ils viennent à la rencontrer dans un auteur Grec. Tout pleins qu'ils en sont, ils vous la citent avec emphase; et si vous ne partagez pas leur enthousiasme, Ah! s'écrient-ils, si vous saviez le Grec! Il me semble entendre le héros de Cervantes, qui, parcequ'il est armé chevalier, voit des enchanteurs où son écuyer ne voit que des moulins.

"Tel est l'inconvénient ordinaire de l'érudition, et il n'y a que les esprits du premier ordre qui puissent l'éviter. L'ignorance, me dira-t-on, n'a-t-elle pas aussi ses inconvéniens? Oui, sans doute; mais on a tort d'appeler ignorans ceux mêmes qui ne sauraient ni Grec ni Latin. Ils peuvent même avoir acquis en François toutes les idées nécessaires pour perfectionner leur raison, et toutes les expériences propres à assurer leur goût. Nous avons des philosophes, des orateurs, des poetes: nous avons même des traducteurs où l'on peut puiser toutes les richesses anciennes, dépouillées de l'orgueil de les avoir récueillies dans les originaux. Un homme qui, sans Grec et sans Latin, aurait mis à profit tout ce qui s'est fait d'excellent dans notre langue, l'emporterait sans dout sur le savant qui, par un amour déréglé des anciens, auroit dédaigné les ouvrages modernes.—*La Mothe, Réflexions sur la Critique*, p. 148.

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way of a plan whose novelty alone would render it but too alarming: a project, which to many will appear romantic, need not be accompanied by an accessory whose aspect is alarming, and whose utility is problematic.

The most stupid and inattentive could scarcely attend upon a long course of instruction without gaining some advantage: they would at least be familiarized with the terms of art, which constitute not only the first, but the greatest difficulty; they would form some idea of the principal divisions of the country they traversed; and should they ever be desirous of directing a more particular examination to any particular division, they will at least know in what direction to seek for it. As all the world would then be occupied with the study of the sciences, they would pretend thus to employ themselves, and would be ashamed to be entirely ignorant of those things which were the subjects of general conversation.

Russia is an instance of the ease with which a new direction may be given to the opinions of a whole people. Nobility of birth is but little respected; — official rank is the only ground of distinction. This change has been effected by a few simple regulations. Unless he be an officer, no individual, how rich or nobly born soever he may be, can vote, or even sit, in the assembly of the nobility. The consequence has been, that all classes have pressed into the service of the state. If they do not intend to make it their profession, they quit it when they have attained the rank which confers this privilege.

Note. — If Mr. Bentham had consented to revise his MSS., which were written more than forty years ago, he might have seen reason to alter many of his observations.

In England, much has been done in the interval. Public opinion has sensibly changed respecting the value of classical learning. It is highly esteemed at college, but elsewhere it is now only considered as an accessory: the most enlightened parents regret that it is still the only object of instruction in our public schools.

Since the establishment of the *Royal Institution*, many similar institutions have been formed, and a general desire for useful knowledge has been disseminated. The ladies have displayed a persevering ardour in their attendance on these means of instruction, so much the more praiseworthy, as it has been uniformly excited by inclination alone. Elementary works have been multiplied; but all this has been done by the exertions of individuals, without any encouragement from the State.

As to public education, it is more easily created than reformed. A good institution would be the best criticism upon the bad. If two or three colleges were founded in London, suited to the wants of the more numerous classes of those who are destined to the pursuits of art, trade, or commerce, in which not Latin or Greek (almost always useless in these avocations) should be taught, but the national language, which has generally been neglected, together with all those branches of knowledge, which if not absolutely necessary, are always useful and agreeable, we should soon see these seminaries draw together a crowd of scholars, and the old colleges would be obliged to correct their system, in order to maintain their ground.

It may be said, that private schools may supply the deficiency; but there is a great difference between public and private establishments. Private education can only succeed by a train of happy events, whilst in public education, a multitude of circumstances are overcome. Besides, domestic education is limited to the rich, whilst public instruction is adapted to the most moderate fortunes.— *Dumont.*

APPENDIX.

(A.) Book I. Ch. viii. p. 210.

On Subscriptions to Matters of Opinion.

OF the two English Universities, Oxford is the most ancient and most dignified. Of its numerous statutes which are penned in Latin, as many as fill a moderate duodecimo volume are published, as the title-page declares, for the use of youth: and of these care is taken (for the honour of the government let it be spoken) that those for whose observance they are designed, shall not, without their own default, be ignorant: since, at every man's admission, a copy is put into his hands. All these statutes, as well those that are seen as those that are not seen, every student at his admission is sworn in Latin to observe, "So help me God," says the matriculated person, "touching as I do the most holy Gospel of Christ."*

* "Tu fidem dabis ad observandum *omnia* statuta, privilegia, et consuetudines hujus universitatis *Oxon.* Ita te Deus adjuvet, tactis sacro sanctis Christi evangeliis."—*Parecbolæ sive*

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The barbers, cooks, bed-makers, errand-boys, and other unlettered retainers to the university, are sworn in English to the observance of these Latin statutes. The oath thus solemnly taken, there has not, we may be morally certain, for a course of many generations, perhaps from the first era of its institution, been a single person that has ever kept. Now, though customary, it is perhaps not strictly proper, as it tends to confusion and to false estimates, to apply the term *perjury*, without distinction, to the breach of an assertive and to that of a promissive declaration — to the breach of an oath and to that of a vow; and to brand with the same mark of infamy a solemn averment, which at the time of making it was certainly false, — and a single departure from a declared resolution, which at the time of declaring it might possibly have been sincere.* But, if they themselves are to be believed who have made the oath, and who break it, — the university of Oxford, for this century and half has been, and at the time I am writing is, a commonwealth of perjurers. The streets of Oxford, said the first Lord Chatham once, "are paved with disaffection." That weakness is outgrown: but he might have added then (if that had been the statesman's care) and any one may add still, "and with perjury." The face of this, as of other prostitutions, varies with the time: perjurers in their youth, they become suborners of perjury in their old age.

It should seem that there was once a time, when the persons subjected to this yoke, or some one on their behalf, began to murmur: for, to quiet such murmurs, or at any rate to anticipate them, a practitioner, of a faculty now extinct, but then very much in vogue, — a physician of the soul, a *casuist*, was called in. His prescription, at the end of every one of these abridged editions of the statutes — his prescription under the title of *Epinomis seu explanatio juramenti, &c.* stands annexed.† This casuist is kind enough to inform you, that though you have taken an oath indeed, to observe *all* these statutes—and *that* without exception. yet, in ninety-nine instances out of a hundred, it amounts to nothing. What, in those instances, you are bound to do is — not to keep your oath, but to take your choice whether you will do that or suffer — not to do what you are bid; but, if you happen to be found out (for this proviso, I take for granted, is to be supplied) to bear the penalty. For — what now do you think your sovereign seriously wishes you to do, when he forbids you to commit murder? that you should abstain from murder at all events? No surely; but that, if you happen to be found out and convicted, you should sit quiet while the halter is fitted to your neck.

Who is this casuist, who by his superior power washes away the guilt from perjury, and controuls the judgments of the Almighty? Is it the legislator himself? By no means: that indeed might make a difference. The sanction of an oath would then not with certainty be violated; it would only with certainty be profaned. It was a Bishop Saunderson, who, in the bosom of a Protestant church, before he was made a bishop, had set up a kind of confessional box, whither tender consciences repaired from all parts to heal their scruples.

This institution, whether it were the fruit of blindness or of a sinister policy, has answered in an admirable degree, some at least of the purposes for which it was probably designed. It has driven the consciences of the greater part of those by whom the efficient parts of government are one day to be filled, into a net, of which the clergy hold the cords. The fear and shame of every young man of sense, of spirit, and reflection, on whom these oaths are imposed, must at one time or other take the alarm. What! says he to himself, am I a perjurer? If he ask his own judgment, it condemns him. What then shall he do? Perjury, were it only for the shame of it, is no light matter: if his education have been ever so loose, he has frequently heard it condemned; if strict and virtuous, he has never heard it mentioned without abhorrence. But, when he thinks of the guilt of it, hell yawns under his feet. What then shall he do? Whither then shall he betake himself? He flies to his reverend instructors in a state of desperation. "These men are older than myself," says he; "they are more learned, they are therefore wiser: on them rests the charge of my education. My own judgment, indeed, condemns me; but my own judgment is weak and uninformed. Why may not I trust to others? See, their hands are outstretched to comfort me! Where can be the blame in listening to them? in being guided by them? in short, in surrendering my judgment into their hands? Are not they my rulers, my instructors? the very persons whom my parents have appointed to take charge of me, to check my presumption, and to inform my ignorance? What obligation am I under, nay, what liberty have I to oppose my feeble lights to theirs? Do they not stand charged with the direction of my conscience?—charged by whatsoever I ought to hold most sacred? Are they not the ministers of God's word? the depositaries of

Excerpta e Corpore Statutorum, p. 250, Oxon. 1756.

* "Statuimus," say these reverend legislators, "idque sub pœna perjurii," in a multitude of places.

† The title at length is *Epinomis, seu Explanatio Juramenti quod de observandis Statutis Universitatis a singulis præstari solet: quatenus scilicet, seu quousque obligare jurantes censendum est.*

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our holy religion? the very persons, to whose guidance I vowed, in the person of my godfathers and godmothers, to submit myself, under the name of my spiritual pastors and masters? And are they not able and willing to direct me? In all matters of conscience, then, let me lay down to myself the following as inviolable rules:—not to be governed by my own reason; not to endeavour at the presumptuous and unattainable merit of consistency; not to consider whether a thing is right or wrong in itself, but what *they* think of it. On all points, then, let me receive my religion at their hands: what to them is sacred, let it to me be sacred; what to them is wickedness, let it to me be wickedness; what to them is truth, let it to me be truth; let me see as they see, believe as they believe, think as they think, feel as they feel, love as they love, fear as they fear, hate as they hate, esteem as they esteem, perform as they perform, subscribe as they subscribe, and swear as they swear. With them is honour, peace, and safety; without them, is ignominy, contention and despair." Such course must every young man, who is brought up under the rod of a technical religion, distinct from morality, and bestrewed with doubts and dangers, take on a thousand occasions, or run mad. To whom else should he resort for counsel?—to whom else should he repair? To the companions of his own age? They will laugh at him, and call him methodist: for many a one who dreads even hobgoblins alone, laughs at them in company. To their friends and relations who are advanced in life, and who live in the world? The answer they get from them, if they are fortunate enough to get a serious one, is—that in all human establishments there are imperfections; but that innovation is dangerous, and reformation can only come from above: that young men are apt to be hurried away by the warmth of their temper, led astray by partial views of things, of which they are unable to see the whole: that these effusions of self-sufficiency are much better repressed than given way to: that what it is not in our power to correct, it were better to submit to without notice: that prudence commands what custom authorizes—to swim quietly with the stream: that to bring matters of religion upon the carpet, is a ready way to excite either aversion or contempt: that humanity forbids the raising of scruples in the breasts of the weak,—good humour, the bringing up of topics that are austere,—good manners, topics that are disgusting: that policy forbids our offending the incurious with the display of our sagacity, the ignorant with the ostentation of our knowledge, the loose with the example of our integrity, and the powerful with the noise of our complaints: that, with regard to the point in question, oaths, like other obligations, are to be held for sacred or insignificant, according to the fashion: that perjury is no disgrace, except when it happens to be punished: and that, as a general rule, it concerns every man to know and to remember, as he tenders his peace of mind and his hopes of fortune, that there are institutions, which though mischievous are not to be abolished, and though indefensible are not to be condemned.

A sort of tacit convention is established: "Give your soul up into my hands—I ensure it from perdition. Surely the terms, on your part, are easy enough: exertion there needs none: all that is demanded of you is—to shut your eyes, ears, lips, and to sit quiet. The topic of religion is surely forbidding enough, as well as a forbidden topic: all that you have to do then, is to think nothing about the matter; look not into, touch not the ark of the Lord, and you are safe."

(B.) Book I. Ch. viii. p. 211.

Mischievousness of Reward latent—Exemplifications.

WHEN a reward is groundless, it may be either simply groundless, or positively mischievous: the act, which it is employed to produce, may be either simply useless, or pernicious.

It would be a nugatory lesson to say, that reward should not be applied to produce any act, of which the tendency is acknowledged to be pernicious; and this whether such act have been aggregated to the number of offences or not. The only cases which it can be of any use, in this point of view, to mention, are those in which the mischievousness of the act, or the tendency of the reward to produce it, is apt to lie concealed.

To begin with the cases which come under the former of these descriptions—those in which the mischievousness of the act is apt to lie concealed. One great class of public services, for which rewards have been or might be offered, are those which consist in the extension of knowledge, or, according to the more common, though obscure and imposing phrase, the discovery and propagation of truth. Now there is one way in which rewards offered for the propagation of truth (that is, of what is looked upon, or professed to be looked upon, as truth) cannot but have a pernicious tendency; and *that* of whatever nature be the proposed truth. A point being proposed, concerning which men in general are thought to be ignorant or divided, if a man sincerely desired that the truth relative to that point should be ascertained, and in consequence of that desire is content to furnish the expense of a reward, the natural course is—to invite men to the inquiry. "How stands the matter? Which of the two contradictory propositions is the true one?" To

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a question of some such form as this, he requires an answer. The service, then, to which he annexes his reward, is the giving an answer to a question—such an answer as upon examination shall appear to be a true one, or to come nearest to the truth. The tendency of a reward thus offered, to produce the discovery of the truth, is obvious: the tendency of it will at least be to produce the discovery of what to him, who puts in for the reward, shall appear to be truth. What else should it tend to produce? My aim being to establish what to you shall appear to be the truth, what other means have I of doing this, but by advancing what appears to me to be so? Accordingly, thus to apply the reward, is to promote a sincere and impartial inquiry, and to pursue the best, and indeed the only course that by means of artificial reward can be pursued for promoting real knowledge.

Another course, which has been sometimes taken, is—to assume the truth of the one of two contradictory propositions that may be framed concerning any object of inquiry,—and to make the demonstration of the truth of that proposition the condition of the reward. In this course, the tendency of the reward is pernicious. The habit of veracity is one of the great supports of human society—a virtue which in point of utility ought to be, and in point of fact is, enforced in the highest degree by the moral sanction. To undermine that habit, is to undermine one of the principal supports of human society. The tendency of a reward thus offered *is* to undermine this virtuous habit, and to introduce the opposite vicious one. The tendency of it may be to produce what is called logical truth, or not, as may happen; but it is, at any rate, to produce ethical falsehood: it may tend to promote knowledge or error, as it may happen; but it tends, at any rate, to promote *mendacity*. The proposition either is true or it is false: and, be that as it may, men are either agreed about its being true, or they are not. In as far as they are agreed, the reward is useless; in as far as they are not, it tends to make them act as if they were, and is pernicious.

It may be said—No; all that it tends to do, at least all that it is designed to do, is to call forth such, and such only, whose opinion is really in favour of the proposition, and to put them upon giving their reasons for it: it is not to corrupt their veracity, but to overcome their indolence. But whatever may be the design, the former is in fact its tendency. On the one side, they have reward to urge them; on the other, they have impunity to permit them. For, when a man declares that his opinions on a given subject are so and so, who can say that they are otherwise?—who can say with certainty, what are a man's private opinions? And if the effect be bad, what signifies the intention? Or how, indeed, can the intention be pure, if it be seen that the effect is likely to be a bad one?

Thus would it stand, were it *doubtful* whether there are any persons or no, whose unbiassed opinions are on the opposite side to that on which the demonstration is sought to be procured. But the case always is, that it is *clear* there are such persons; that it is the very persuasion of there being such, that is the cause of offering the reward; and that the more numerous they are, the more likely it is to be offered, and the greater it is likely to be. Such, then, is the danger of promoting mendacity: to avoid which danger, it may be laid down in short terms, as a general rule, that *reward should be given—not for demonstration, but for inquiry.*

More than this, a reward thus applied tends always, in a certain degree, to frustrate its own purpose; and is so far, not only inefficacious, but efficacious on the other side. It does as good as tell mankind, that, in the opinion of him at least by whom the reward is offered, the probability is that men's opinions are most likely to be on the opposite side; and in so far gives them reason to think that the truth is also on that opposite side. "People in general," a man will naturally say to himself, "are not of this way of thinking: if they were, what need of all this pains to make them so?" This, then, affords another reason why reward should be given—not for demonstration, but for inquiry.

Such, accordingly, has been the course pursued in relation to almost every branch of science, or supposed science. The science, or supposed science of divinity, furnishes exceptions, which are perhaps the only ones. What should we say to a man who should seek to promote physical knowledge by such devices? What should we say to a man, who instead of setting men honestly and fairly to inquire *whether*, in regard to living powers, for example, the momentum were in the simple or in the duplicate proportion of the velocity—whether heat were a substance, or only a quality of other substances—whether blunt or pointed conductors of electricity were the safest,—should pay them for endeavouring to prove, *that* in living forces the momentum is in the simple proportion only, that heat is only a quality, and that blunt conductors are the safest?

In divinity, however, examples of this method of applying reward are frequent.

It may be said, that an exception ought to be made from the rule, in the cases wherein, on whichever side the truth may be, the utility is clearly on the side thus favoured. Thus there is use, for instance, in the people's believing in the being and attributes of a God: and *that* even in a political view, since upon that depends all the assistance which the po-

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litical can derive from the religious sanction: and that there can be no use in their disbelieving it. That there is use again, in the people's believing in the truth of the Jewish prophecies; since upon that depends one argument in favour of the truth of that history, the truth of which is one main ground of men's expectation of the rewards and punishments belonging to that sanction. This observation certainly deserves great attention. It exhibits a reason which there may be for making an exception to the rule. It does not, however, invalidate the arguments adduced, as above, in favour of it: it does not disprove the probability of the mischiefs on the apprehension of which it is grounded. What it does, is to exhibit a benefit to act in balance against these inconveniences. If, then, the interests of religion be at variance with those of virtue, and it be necessary to endanger the one in order to promote the efficacy of the other, — so then it must be.

It is to be observed, that all the advantage which can accrue to the cause from this manœuvre is composed of the difference between what it may derive from these hireling advocates, and what, were there no such artificial encouragement given, it would derive from volunteers. On this head it may be worth considering, whether the calling forth of the one does not contribute to prevent the enlistment of the other. "What need is there for me, a stranger, to give myself the trouble, when there are so many others whose particular business it is, and who are so well paid for it?" Of this sort is the language which a man will very naturally hold with himself on such occasions.

A strange circumstance it would be indeed, — and one which would afford no very favourable presumption either of the truth or of the utility of the cause which it is meant to favour, — if all the unbiassed suffrages of any considerable majority in number or value of the thinking men should, if left to themselves, be on the opposite side. Great, indeed, must be the penury of unbought advocates, that can make it advantageous, — I do not say merely to the cause of truth, but to any cause, however wide of the truth, — to apply to mercenaries for assistance. Of how little weight the suffrages of the latter are in comparison of those of the former, let any one judge, who has observed the superior eclât with which the work of a layman is received, when it happens to be on the side of orthodoxy.

But however the matter may stand with regard to questions of political importance, in which utility is clearly on one side — whatever reason there be for violating the law of impartiality in this case, it ceases altogether when applied to the merely speculative points which form the matter of those articles of faith, to which on a variety of occasions subscriptions or other testimonies of acceptation are required. These will serve as one set of instances of the other branch of the cases, where the mischievous effects of reward are apt to lie concealed; viz. where, in the case of a line of conduct produced by a reward, apparent or no, the tendency of the reward to produce it is apt not to be apparent at first glance — inasmuch as it may escape observation, that the advantage held forth acts to this purpose in the capacity of a reward.

For an emolument to operate in the capacity of a reward, so as to give birth to action of any kind, it is not necessary that it should be designed so to do. Whenever any such connexion is established between emolument on the one part, and a man's conduct on the other, that by acting in any manner he sees that he acquires an emolument, or chance of emolument, which without acting in such manner he could not have, — the view of such emolument will operate on him in the capacity of a reward. It matters not whether it be the sole act which is to entitle him to the reward, or only one act amongst many. It matters not whether it be the act to which the reward is professedly annexed, or any other act of which no mention is made. It may not be held up to view in that character: it may even be not held up to view at all. In this unconspicuous way an emolument may operate, and in a thousand instances does operate, in the capacity of a reward, on a long and indefinite course of action — in short, on the business of a whole life. Whenever, on the part of the same person, two acts are so connected, that the performance of the one is necessary to his having it in his power to perform the other, a reward annexed to the latter operates eventually as if annexed to the former; and, whether designedly or not, it promotes the production of the one act as much as of the other. In this case, the having performed the prior act is said to be a *qualification* for the being permitted to perform the posterior. The emolument annexed to the act professedly rewarded, is therefore, in this case, as much a reward for assuming the qualification, as a reward for performing the act, for the performance of which a man is required to qualify himself by the performance of the other.

In England (for I will go no farther) the subscribing a declaration of this sort is made a qualification for many of the principal emoluments to which a man can aspire: for every preferment in the church — for the liberty of engaging in the instruction of youth — for admission to the benefits of that mode of education which is looked upon as most liberal and advantageous, and thereby to the enjoyment, or the chance of the enjoyment of any one of that ample stock of emoluments which

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have been provided in the view of inducing young persons to put themselves in the way of that favourite mode of education. The articles, or propositions, to which this subscription is required, are termed Articles of Religion. By subscribing to these articles, a man declares that he believes the truth of certain facts which they aver. Among these facts there are many, which, whether true or not (a point which is nothing to the present purpose) are plainly, in a political view, of no sort of importance whatsoever. I say of no importance; since they contribute nothing to the furnishing either of any motive to prompt to action, or of any rule or precept to direct it. Be they true, or be they false, — nothing is to be done in consequence — nothing to be abstained from.

The mischievous tendency, which the giving a reward has in this case, is much more palpable than what it has in the other; because the probability of its giving birth to falsehood is the greater.

1. In the case of demonstrative lectures, all that it is absolutely necessary a man should do, is — simply to state the arguments in favour of the proposition in question: he does not necessarily assert his own belief of the truth of it. "Such are the reasons," he may say, "which induce other people, and which, if attended to, may perhaps induce you to believe it: whether they are conclusive or not, it lies upon you to judge: as to myself, whether I myself believe it or no, is another matter. I do not tell you — I am not bound to tell you." In the case of subscription, he directly, plainly, and solemnly says — I believe it.

2. In the next place, the probability of falsehood is much greater in this case than in the other. In the case of demonstrative lectures, men are reasoned with, *lest* otherwise they should not believe: in the case of subscriptions, men are rewarded for subscribing, because it is known many do not believe. Had men never disbelieved or doubted, they never would have been called upon to subscribe: it would have been useless and needless; nor would any one have thought of it.

Those who are inclined to place in the most favourable point of view the political efficacy of subscriptions to such articles, have called them *articles of peace;* as if there were nothing more in saying, I believe this proposition, than in saying, I engage not to say anything that tends to express a disbelief of it.

They would have been much better named, had they been termed *articles of war.*

In regard to speculative opinions, there are but two cases in which men can be said to be at peace: when they think about it, and are of the same opinion; and when they think nothing about the matter: unless we reckon as a third, that of their thinking about it, and differing about it, and not caring about the difference. That the expedient in question has no tendency to promote peace of the first kind, has been already shown: it is equally clear, that it has none to produce peace of either of the two other kinds. The tendency of it is just the contrary. If left to himself, there is not one person in a hundred who would ever trouble himself about the matter. Of this we may be pretty certain. What motive should he have?—what should lead him to it?—what pleasure or what profit is there to be got by it? If left, then, to themselves, the bulk of mankind, — or, to speak more properly, the bulk of those whom it is proposed thus to discipline,—would think nothing about the matter. They would therefore be in a state of the profoundest and most lasting peace. If this should not be granted, at least it will be granted, that it would be possible for them to be so. Subscriptions render it *impossible.* For making peace between men, subscriptions are just the same sort of recipe that it would be for making peace between two mastiffs, to set a bone before them, and then tie them to the same stake.

When both parties are at liberty, both parties are at their ease, and there is peace between them. But when the stronger party says to the weaker, — "Stand forth and lie in the sight of God, or give up the choicest advantages of society, that we may engross them to ourselves," what sort of peace is it that can subsist between them? Just that sort of peace which subsists between the housebreaker and the householder, when the one has bound the other hand and foot, and gagged him. It is not to be denied but that there may be some sort of uneasiness between them in the first-mentioned state of things; to wit, where, neither of them being sacrificed, they are both at liberty, and both of them protected. But what sort of uneasiness is this? Just that sort of uneasiness which may perhaps subsist between two neighbours at the thought that neither of them can break into the other's house. Against this sort of uneasiness, peace, it must be confessed, affords no remedy: but, from the possibility of there subsisting this sort of uneasiness between two neighbours, or two nations, who ever thought of speaking of them as not being at peace?

If this method of insuring peace were good in one case, how should it be otherwise in any other? Religion, or rather the nonsense which has been grafted on it — (for the part that is capable of being made useful is not thus exposed to controversy) — religion, I say, is not the only topic which has given rise to controversy. So long as there is any man whose knowledge falls short of omniscience, and whose faculties are liable to error, men

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will have their differences: they will differ about matters of judgment, and about matters of taste—about the sciences, about the arts, about the ordinary occurrences of life; in short, about everything which has a name. It would then be making peace among the lovers of music to make them swear before God, that they think the Italian style, or that they think the French style, of music is the more pleasing; among the lovers of heroic poetry, that they think it best in blank verse, or that they think it best in rhyme; among the lovers of dramatic poetry, that the unities of time and place may be dispensed with, or that they must be observed. It would be making peace between an affectionate pair, to question them about every possible point of domestic management, till some slight diversity were found in their opinions, and then force one of them to swear, before God, that he was convinced his own opinion was the wrong one. It would be making peace —— But surely by this time, the pacific tendency of this policy must be sufficiently understood.

Another mischievous effect of this policy is the tendency it has to vitiate the *understanding*. Over a man's genuine opinion, such forms, it has been shown, can have no influence: either his veracity must give way, or his understanding, or both: he must deceive either himself or others. A deceit of some kind or other he must put on somebody; either on himself or others. There is one thing which a man cannot do; that is, destroy the force of arguments which are actually present to his mind. There is another thing which he is enabled to do in a great measure; that is, keep them from getting there. This, accordingly, is what, if the consciousness of falsehood sit uneasy on him, he will labour to do with all his might. To believe, is not in his power: for, when all the arguments that have ever been urged, or can be devised, in favour of the proposition, are collected and applied to his mind, and make no impression, what help is there? What may perhaps be in his power is, not to disbelieve: and that, if possible, he will do. But thus to shut the right eye, if one may so say, of the understanding, and keep open only the left, is not the work of a minute nor of an hour. He must make many ineffectual attacks, and return as often to the charge: he must wage war against the stubbornness of the understanding—he must bring it under the dominion of the affections—he must debilitate its powers—he must render it incapable of placing, in a clear light, the difference between right and wrong: in a word, he must instil into his mind a settled habit of partiality and bad reasoning—a habit of embracing falsehood with facility, and regarding truth, not with indifference merely, but with suspicion, in the apprehension of being brought by it into trouble.

One might imagine, that it could not have both these bad effects at once; that if it have the one, it cannot have the other: if a man disbelieve, his understanding—if he believe, his morals,—are yet safe. But whoever thinks thus, is led away by words: he does not understand aright the workings of the human mind. He supposes the mind fixed as between two rocks; whereas it is perpetually shaken and tossed about, as by a thousand waves. He supposes a man at all times perfectly conscious of the state of his own mind, and aware of the momenta and directions of the incessantly fluctuating forces that are operating on him. But this is not the case with one man in a million, in any the least degree; nor perhaps with any man in perfection. Thus it is also with hypocrisy and fanaticism: it might naturally be imagined, that the one excludes the other; but repeated experience, and long-continued observation, have at length opened the eyes of most men upon that head: and it seems now to be pretty generally understood, that these two seemingly incompatible bad qualities are found frequently in the same receptacle.

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LEADING PRINCIPLES

OF A

CONSTITUTIONAL CODE,

FOR ANY STATE.

BY

JEREMY BENTHAM.

(FIRST PUBLISHED IN THE PAMPHLETEER, NO. 44, 1823.)

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CONSTITUTIONAL CODE, &c. &c.

SECTION I.

ENDS AIMED AT.

1. THIS Constitution has for its general end in view, the greatest happiness of the greatest number;* namely, of the members of this political state: in other words, the promoting or advancement of their interests. By *the universal interest*, understand the aggregate of those same interests. This is the all-comprehensive end, to the accomplishment of which, the several arrangements contained in the ensuing code are all of them directed.

2. Government cannot be exercised without coercion; nor coercion, without producing unhappiness. Of the happiness produced by government, the net amount will be — what remains of the happiness, deduction made of the unhappiness.

3. Of the unhappiness thus produced, is composed, in the account of happiness, the *expense* of government. Of the happiness produced by government, the gross amount being given, the net amount will be inversely as this expense.

4. Of the members of this, as of other states in general, the great majority will naturally, at each given point of time, be composed of the several persons who, having been born in some part or other of the territory belonging to the state, have all along remained inhabitants of it. But, to these, for the purpose of benefit, of burden, or of both, will be to be added sundry other classes of persons, of whom designation is made in an appropriate part of the ensuing code.

5. Immediately specific, and jointly all-comprehensive, ends of this constitution are —subsistence, abundance, security, and equality; each maximized, in so far as is compatible with the maximization of the rest.

6. I. *As to Subsistence.*† This speaks for itself.

7. II. As to *Abundance.* This is an instrument of felicity on two accounts: on its own account, and as an instrument of security for subsistence. In this latter character, its usefulness may be still greater to those who possess it not, than to those who possess it.

8. III. As to *Security.*‡ This is *for* good,

* If the nature of the case admitted the possibility of any such result, the endeavour of this constitution would be — on each occasion, to maximize the felicity of *every one* of the individuals, of whose interests the universal interest is composed; on which supposition, the greatest happiness of *all*, not of the greatest number only, would be the end aimed at.

But such universality is not possible. For neither in the augmentation given to the gross amount of *felicity*, can all the individuals in question ever be included; nor can the *infelicity*, in which the *expense* consists, be so disposed of, as to be borne in equal amount by all: in particular, such part of that same expense, as consists in the suffering produced by *punishment*.

Thus it is, that to provide for the greatest felicity of the greatest number, is the utmost that can be done towards the maximization of universal national felicity, in so far as depends on government.

† By *subsistence* — or say *matter of subsistence* — may be understood everything, the non-possession of which would be productive of positive physical suffering: — that, and nothing more. In so far as distinct from, and not comprehended in, the corresponding branch of security, namely, security for subsistence — subsistence itself must be understood as being, in the field of time, limited to a single instant — any instant taken at pleasure.

Accordingly, of the several elements or dimensions of value, to *extent* alone, as measured by the *number* of the individuals in question, can *maximization*, on this occasion, be applicable.

‡ In the words *good* and *evil*, apt additaments being employed, may be seen two appellatives, which, — opposite as are the sensations and other objects which they are employed to designate, — are, as to no small part of their extent, interconvertible: by ablation of *good*, evil is produced; by ablation of *evil*, good. But, on some occasions, the one is the more convenient appellative; on others, the other; on others again, both. Infinite, and in no small degree perhaps irremoveable, are the ambiguity and obscurity produced at every turn by the imperfections of *language*: language, that almost exclusively applicable, though so deplorably inadequate, instrument of human converse.

Of *security* — considered in so far as it belongs to government to afford it, — the several *subject-matters*, corporeal, incorporeal, or say fictitious, taken together, have been found comprehendible under the five following heads: —

1. *Person*: the security afforded in this case, is security *against* evil, in whatever shape a man's

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or *against* evil. Security for good is — either for the matter of subsistence, or for the matter of abundance.

9. Security against evil, is either against evil from calamity,* or against evil from hostility.

10. By *calamity*, understand human suffering, in the case in which, by its magnitude and indeterminateness in respect to extent, it stands distinguished from, and above, the quantity ordinarily produced by one and the same cause.

11. By evil from calamity, understand evil from purely physical agency: by evil from hostility, evil from human agency. But, by purely physical agency, no evil is producible, which may not, from human agency, receive its commencement or its increase.

12. Of calamity, the principal sources are —inundation, conflagration, collapsion, explosion, pestilence, and famine.

13. The evil-doers, against whose hostility, that is to say, against whose evil agency, security is requisite, are either external or internal. By the external, understand those adversaries who are commonly called *enemies*.

14. Internal adversaries, against whose evil agency security is requisite, are the *unofficial* and the *official*.

15. By the *unofficial* adversaries, understand those evil-doers who are ordinarily termed *offenders*, *criminals*, *malefactors*. These are resistible, everywhere resisted, and mostly with success.

16. The *official* are those evil-doers whose means of evil-doing are derived from the share they respectively possess in the aggregate of the powers of government. Among these, those of the highest grade, and in so far as supported by those of the highest, those of every inferior grade, are everywhere irresistible.

17. To provide, in favour of the rest of the community, security against evil in all its shapes, at the hands of the above-mentioned internal, and, so long as they continue in such their situation, irresistible adversaries, — is the appropriate business of the constitutional branch of law, and accordingly of this code.

18. As in difficulty so in importance, this part of the business of law far surpasses every other. Of the danger to which an assemblage of individuals stand exposed, the *magnitude* will be in the joint ratio of the *intensity* of the evil in question on the part of each, the *duration* of it, the *propinquity* of it, the *probability* of it; and, on the part of all, the *extent* of it; the extent, as measured

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person, body and mind included, stands exposed to it.

2. *Property:* under which denomination, the matter of *subsistence* and the matter of *abundance*, as above, are comprehended.

3. *Power:* considered in its two distinguishable branches — the *domestic* and the *political*.

4. *Reputation:* a fictitious entity, the value of which, considered in the character of a subject-matter of possession and security, consists in its being a source of respect, or love, or both: and as being, in either case, an eventual source of *good offices*, or say of *services*, receivable from other persons, by the person by whom it is possessed. Take away all services, eventual as well as actual, you strip it of all intelligible value.

5. *Condition in life:* a factitious and fictitious entity, compounded of *property*, *power*, and *reputation*, in indeterminate and indefinitely diversifiable proportions. In the idea of *power*, that of *right* — meaning legal *right*, as being a particular modification of it — a sort of *eventual power* is included.

Examples of condition in life are: — 1. Those constituted by the several genealogical relations, expressed by the words, *husband*, *wife*, *son*, *daughter*, *father*, *mother*, and so on, throughout the whole genealogical tree; 2. The several distinguishable *occupations*, profit-seeking ones included; and the several *political situations*, corresponding to the several offices, with the powers and functions respectively attached to them.

Taken together, — the injuries, *against* which, security *for* these five several subject-matters is requisite to happiness, constitute the most obvious, and as it were tangible, portion of the matter of the *Penal code:* as does the detailed description of the several *cases*, in which a man has *a right to security* against these several injuries, those to property in particular, that of the *civil code:* right to *security*, that is to say, to the eventual appropriate *services*, of the several classes of public functionaries — that is to say, judges and their subordinates, by the exercise of whose functions it is afforded.

A distinction — which must here be kept in view, or a conception, as afflictive as it would be erroneous, will be entertained, is — *that* between a defalcation made from a subject-matter of security (say, for example, from *property*,) and a defalcation from security itself: in which latter case, in the phrase commonly employed, a *shock* is spoken of as being given to security. However the subject-matter of security be lessened, security itself will not be lessened, if by means of the defalcation made from the subject-matter, the probability of retaining what remains of it, be not lessened. By any such defalcation made from the subject-matter of security taken in the aggregate, so far is security itself from being necessarily lessened, that without such defalcation it could not have existence. Witness *taxation:* without which, nowhere could the business of government be carried on: nowhere could security against adversaries of any class have place: nowhere could security against calamity in any shape be afforded by government.

* The giving execution and effect to precautionary arrangements, taken with a view to calamity, belongs to one branch of that part of the business of the executive department, which in the ensuing code is styled the *preventive service:* the giving the like support to such precautionary arrangements as are taken with a view to hostility at the hands of the unofficial and resistible class of adversaries, belongs to the other branch of that same service.

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by the *number* of those who stand exposed to it. Measuring it in every one of these *dimensions*,—taking into account every one of these *elements of value* in both cases,—minute will be seen to be the danger to which the other members of the community stand exposed at the hands of those their resistible, in comparison with that to which they stand exposed at the hands of these their irresistible, adversaries. In the first case, it has place on no other than an individual scale; in the other, on a national scale.

19. Inferior even is the danger to which they stand exposed at the hands of foreign and declared enemies, in comparison with that to which they stand exposed at the hands of their everywhere professed protectors. Foreign enemies, in the event of their obtaining the object of their hostility, withdraw most commonly from whatever territory they invade, leaving the inhabitants thenceforward unmolested. At the worst, they keep possession of it: and in that case, from the external and resistible, become the internal and irresistible adversaries, such as those above mentioned.

20. On the texture of the *constitutional* branch of law, will depend that of every other. For on this branch of law depends, in all its branches, the *relative and appropriate aptitude* of those functionaries, on whose will depends, at all times, the texture of every other branch of law. If, in the framing of this branch of law, the greatest happiness of the greatest number is taken for the end in view, and that object pursued with corresponding success, so will it be in the framing of those other branches: if not, not.

21. IV. Lastly, as to *Equality*. In the instances of *subsistence*, *abundance*, and *security*, the title of the object to the appellation of an instrument of felicity, is stamped, as it were, upon the face of it—designated by the very name. Not so in the case of equality.

22. In the idea of *equality*, that of *distribution* is implied. Distribution is either of *benefits* or of *burdens*: under one or other of these names, may every possible subject-matter of the operation be comprised. Benefits are distributed by *collation* made of the instruments of felicity—burdens by the *ablation* of them, or by the *imposition* of positive hardship.

23. I. In proportion as equality is departed from, inequality has place: and in proportion as inequality has place, evil has place. First, as to inequality,—in the case where it is in the *collation* made of those same instruments that it has place. In this case, it is pregnant with two distinguishable evils: the one may be styled the *domestic* or *civil*; the other, the *national* or *constitutional*.

24. The *domestic* evil is that which has place in so far as the subject-matter of the distribution is the matter of wealth—matter of subsistence and abundance. It has place in this way:—The more remote from equality are the shares possessed by the individuals in question, in the mass of the instruments of felicity,—the less is the sum of the felicity produced by the sum of those same shares.

25. The national or constitutional evil is that which has place, in so far as the subject-matter of the distribution is *power*. It has place in this way:—The greater the quantity of power possessed, the greater the facility and the incitement to the abuse of it. In a direct way, this position applies only to *power*. But, between *power* and *wealth* such is the connexion, that each is an instrument for the acquisition of the other: in this way, therefore, the position applies to *wealth* likewise.

26. Of inequality as applied to both subjects,—and of the evil with which, in both the above shapes, it is pregnant,—the case of *monarchy* may serve for exemplification: for exemplification, and thereby for proof.

27. Of the maximum of inequality, every monarchy affords an example. Of the matter of wealth, to the monarch is allotted a mass as great as suffices for the subsistence of from 10,000 to 100,000 of the individuals from whom, amongst others, after being produced by their labour, it is extorted. Yet does it still remain matter of doubt, whether the quantity of felicity thus produced in the breast of that one, be greater than that which has place in the breast of one of those same labourers taken on an average,—has place, or at least would have had, but for the extortion thus committed.

28. What is certain is—that the quantity of felicity habitually experienced by a gloomy, or ill-tempered, or gouty, or otherwise habitually diseased monarch, is not so great as that habitually experienced by an habitually cheerful, and good-tempered, and healthy, labourer.

29. True it is, that if, *per contra*, by a monarch maintained at an expense such as the above, good is, by means of that same expense, produced in greater quantity than by a common wealth chief whose maintenance will not be a hundredth part of the monarch's;—true it is, that on this supposition, the excess of expense, vast as it is, may be not ill-bestowed. But, by whomsoever the existence of any such excess of good is asserted, upon him does it rest to prove or probabilize it.

30. If, in the case of those whose share in the *instruments* of felicity is *greatest*, the excess of *felicity itself* is, on an average, so small,—and, in some individuals out of the small number belonging to this class, the non-existence of any such excess certain—still

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less and less will be the probable amount of the excess of felicity, in the case of those whose share in the instruments of felicity is *less* and *less*. And thus it is, that as, in a pure *monarchy*, the distribution made of the external instruments of felicity is in the highest degree — so, in a pure *aristocracy*, is it in the next highest degree — unfavourable to the maximization of felicity itself.

31. Hence, throughout the whole population of a state, the less the inequality is between individual and individual, in respect of the share possessed by them in the aggregate mass or stock, of the instruments of felicity, — the greater is the aggregate mass of felicity itself: provided always, that by nothing that is done towards the removal of the inequality, any shock be given to security, — security, namely, in respect of the several subjects of possession above mentioned.

More shortly thus: —

32. The less unequal the distribution of the external instruments of felicity is — the greater, so as security be unshaken, will be the sum of felicity itself.

33. On the occasion of the distribution made of a mass of burdens, *delinquency* either is, or is not, in question: is not — as where it is for defraying the expense of government that the burdens are imposed.

34. A burden imposed on the occasion of delinquency, is imposed either for the purpose of its operating in the way of *punishment*, or for the purpose of conferring a correspondent *benefit* on some other person or persons, in *compensation* for damage sustained — sustained, namely, in consequence of the delinquency.

35. Correspondent to the evil produced by inequality in the case of *collation*, is the evil produced by it in the case of *ablation*, — ablation made of a mass of the external instruments of felicity in any shape, and in particular in the shape of *wealth*. Other circumstances the same, — the smaller the mass a man possesses of the instruments of felicity in this shape, the greater is the loss of felicity produced in his instance by the ablation of any given mass of them. By the ablation of fifty pounds, more felicity will be abstracted from the breast of a man who has but one hundred pounds for his whole property, than from the breast of one who has two hundred pounds; much more would it, if, instead of the hundred pounds, he had but that same fifty pounds.

36. II. So much for felicity, considered as the product of government. Now as to infelicity, considered as the *expense* by means of which that same felicity is produced. Maximization was the object in regard to the desired product: *minimization* is the object in regard to the expense. Now as to the *elements* of that same expense.

37. The expense is evil — evil produced either for the exclusion of greater evil, or for the production of more than equivalent good: it may be distinguished into *punishment* and *hardship*.

38. *Punishment* is evil, produced under the notion of its being a direct instrument, or efficient cause, of some good *thereby* desired and intended to be produced.

39. *Hardship* is evil, produced as a collateral result of some operation employed for the exclusion of evil, or for the production of good: a collateral result, not an efficient cause.

40. In respect of its shape, expense employed by government, as above, is either *non-pecuniary* or *pecuniary*.

41. The non-pecuniary expense of government is *hardship at large*: the principal modification of it is that produced by forced *personal service*: and, of forced personal service, that produced by forced *military* service.

42. As to the matter of expense, in no shape can it ever be procurable by government, in anything like sufficient quantity, without hardship, or punishment, or the fear of it, or both.

43. Whatever is done by government is done — partly by means of the matter of *punishment*, or the *fear* of it, partly by means of the matter of *reward*, or the *hope* of it.

44. The matter of reward is a portion of the matter of good, considered as employed in the production of felicity in the breast of some individual, in consideration of some act done or supposed to be done by him, or about to be done by him.

45. The matter of reward is not, in any sufficient quantity, procurable by government without expense — expense, as above, in the shape of hardship and punishment.

46. Accordingly, on no occasion, and for no purpose, is *good* producible by government, but through *evil*, as above.

47. Hence, in so far as may be without detriment to the net amount of good produced, the maximization of national felicity requires that *factitious reward* (reward applied by the hand of government, at the expense of the community) be in every shape *minimized*, as well as the matter of punishment.

SECTION II.

PRINCIPAL MEANS EMPLOYED FOR THE ATTAINMENT OF THE ABOVE ENDS.

1. These means are comprisable, all of them, in one expression: maximization of *appropriate official aptitude* on the part of rulers.

2. Of this aptitude, three branches are distinguishable: 1. Appropriate *moral* aptitude; 2. Appropriate *intellectual* aptitude; 3. Appropriate *active* aptitude.

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3. Of appropriate intellectual aptitude there are two distinguishable branches: 1. Appropriate *knowledge;* 2. Appropriate *judgment.*

4. By appropriate moral aptitude, understand — disposition to contribute, on all occasions and in all ways, to the greatest happiness of the greatest number; in other words, to the promoting or advancement of the universal interest.

5. If appropriate *moral* aptitude be to a certain degree deficient, — the consequence is, that by abundance of appropriate aptitude in those other shapes, the aggregate of appropriate aptitude will naturally, instead of being increased, be diminished. If hostile to the interests of the greatest number, — the more able the functionary, the more mischievous.

6. To the different branches of appropriate official aptitude, apply correspondently different means. Expressed in the shortest manner, indication may be given of them by the following rules.

7. I. Means applying to appropriate *moral* aptitude: —

Rule 1. In the hands of those of whose happiness the universal happiness is composed, keep at all times the choice of those agents, by whose operations that happiness is to be promoted.*

8. Rule 2. In the hands of each such agent, minimize the power of doing *evil.*

9. Rule 3. Leave, at the same time, as little diminished as may be, the power of doing good.

10. Rule 4. Minimize the quantity of public money at his disposal.

11. Rule 5. Minimize the time during which it remains at his disposal.

12. Rule 6. Minimize the number of hands through which it passes in its way to the hand by which it is received in payment.

13. Rule 7. Extra-reward give none, without proportionable extra-service — extra-service *proved,* and *that* by evidence not less conclusive than that which is required to be given of *delinquency,* with a view to *punishment.*

14. Rule 8. Maximize each man's *responsibility* with respect to the power and the money with which he is entrusted.

15. Rule 9. Means by which such responsibility is maximized, are — 1. Constant dislocability; 2. Eventual punibility.†

16. Rule 10. By the several means above mentioned, — so order matters, that, in the instance of each such agent, the course prescribed by his particular *interest* shall on each occasion coincide, as completely as may be, with that prescribed by his *duty:* which is as much as to say, with that prescribed by his share in the universal interest.

II. Means applying to appropriate intellectual and active aptitude: —

17. Rule 1. For appropriate intellectual and active aptitude, — establish, throughout the whole field of official duty, appropriate preliminary *tests* and *securities.* For these, see the code itself.

18. Rule 2. Maximize, throughout, the efficiency of these same tests and securities.

19. Rule 3. Minimize, in the instance of each office, the pecuniary inducements for the acceptance of it.

20. Follow the observations on which Rule 3 is grounded.

I. The less the money required by a man for subjecting himself to the *obligations* attached to the office, the stronger the proof afforded by him of his relish for the *occupations.*

21. Still stronger, and in a proportionable degree, will be the proof, — if, instead of receiving, he is content to *give.*

22. Every penny, — added to whatsoever remuneration is, as above, sufficient, — adds strength to predatory appetites, and to the means of gratifying them.

23. A throne, — seat of the most extravagantly fed, — is so, everywhere, of the most invariably insatiable, appetites.

24. As to the means, applying, as above, to appropriate moral aptitude, — there is not one of them, of which an exemplification may not be seen, in the constitution of the Anglo-American United States.

25. Under that constitution, in so far as depends on government, — has uncontrovertibly been, and continues to be, — enjoyed, a greater quantity of happiness, in proportion to population, than in any other political community, in these or any other times.

* To this arrangement, no objection, wearing the face of a rational one, could ever be made, other than that of *impracticability* — an objection formed by the assertion, that, consistently with internal peace and security, no such arrangement can have place. But, in the case of the Anglo-American United States, the groundlessness of this objection has been completely demonstrated by experience — demonstrated by the very first experiment ever made; while, to the purpose of all such persons as had a new constitution to make, this same arangement, even on the supposition that the experiments made of it had, in a considerable number, all of them failed, might still have remained the only eligible one: for, as will be seen below, the above-mentioned constitution is one, which, bating irresistible force from without, affords a reasonable promise of everlasting endurance; whereas every other form of government contains, in the very essence of it, the seeds of its own dissolution — a dissolution which, sooner or later, cannot but have place.

† Namely, immediately or unimmediately, at the hands of those by whom the responsible agents in question were chosen; as is the case in the Anglo-American United States. Say — dislocability, immediately: punibility, unimmediately; namely, by the hands of other agents.

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26. By that one example is excluded, and for ever, all ground for any such apprehension, real or pretended, as that of inaptitude, on the part of the people at large, as to the making choice of their own agents, for conducting the business of government.

27. Nowhere else has such universal satisfaction been manifested: satisfaction with the form of the government—satisfaction with the *mode* in which, satisfaction with the *hands* by which, the business of it has been carried on. No other political community is there, or has there ever been, — in which, by so large a proportion of the population, so large a part has been constantly taken in the conduct and examination of the affairs of government; — no other, in which the part so taken has been so perfectly unproductive of disorder and suffering in every shape.

28. No other constitution is there, or has there been, under which, in anything like so small a degree (slave-purchasing and pertinaciously slave-holding States always excepted,) the interest and happiness of the many have been sacrificed to those of the ruling and influential few; — no other, under which what yet remains of that sinister sacrifice, will, with so little difficulty, and sooner or later with such perfect certainty, be abolished.

29. Thus much as to the *all-comprehensive* end of government, in so far as the government is *good*. As to the several abovementioned *specific* ends, — the means for compassing them would not here have been in their place. The description of them will be found to be in great measure different, according to the differences between the respective ends: they will form the subject-matter — in the first place, of the constitutional — in the next place, of the penal and non-penal, codes.

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ON THE

LIBERTY OF THE PRESS,

AND

PUBLIC DISCUSSION.

BY

JEREMY BENTHAM.

(FIRST PUBLISHED IN 1821)

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ADVERTISEMENT.

THE lot of the present Tract has hitherto been rather unfortunate. It was begun, continued, and ended, for the purpose, and under the full assurance of its being translated into Spanish, and published at Madrid: it was sent, in the hope of its reaching that capital time enough to be before the public antecedently to the day on which the proposed law, which was the subject of it, would come under final discussion. The person, by whom it was to have been translated and published, was Mr. Mora, at that time editor of *El Constitucional*, the most popular, the most ably conducted, and the most distinguished of the Madrid daily papers. Had they gone according to the course of the post, the letters in question (four in number) would, even the last of them, have arrived in time. But in the first instance, in a proportion which has never been ascertained, some or all of them miscarried. As the miscarriages became ascertained or suspected, other copies were sent; and, at last, the complete series were received. In the meantime, the law, the prevention of which they had in view, passed. But, though the only individual object which they had in view was thus at an end, and the design of them thus far frustrated, the more extensive object which they had in view — more extensive in place as well as time — was neither at an end, nor in its nature capable of being put to an end. That object was — the rendering it manifest, how indispensable, at all times and everywhere, those two intimately-connected liberties — the liberty of the press, and the liberty of public discussion by word of mouth — are to everything that can with any propriety be termed good government. Thus it is, that in respect of this its major object, the work, small as it is, belongs not with less propriety to the country in the language of which it was written, than to that for the language of which it was designed — to the present month of July 1821, in which it is now published, than to the months of September and October 1820, in which it was written: to these countries, not to speak of other countries — to the present month and year, not to speak of future ones.

The law against which these Letters were directed, was passed: but the effects, at the production of which it aimed, have not been produced. The Spanish press has not been enslaved: Spaniards have not, like Englishmen, submitted to be gagged: Spanish, instead of being like English and French ministers, absolute, have been expelled. As to massacres, the authors of that of Cadiz, though they enjoy not the same triumph, nor have obtained the same rewards, have as yet, it is believed, enjoyed nearly the same impunity with those of the Manchester massacre. But the punishment of those who showed what legitimacy and social order is at Cadiz, is yet to come, and may even yet not improbably come: in that country punishment may yet be for the authors of misrule and massacre; while, in this country, it is reserved for the victims of misrule — for those who have escaped from massacre.

Of the reception experienced at Madrid by subsequent addresses of the same author to the same people, something may come to be said, in another publication which is in readiness to pass through these same hands.* As to the present Tract, its lot at Madrid remains still in abeyance. It had been about half translated, when, by an act of the sort here protested against, the translator was thrown into a prison. The illegality of that act has since been recognized, and his enlargement has been the consequence. But, under the extraordinary weight of the business which presses upon him in these eventful times, whether the translation has as yet been published, or so much as completed, is not at present known: if not by his, it will, however, ere long, be laid before the Spanish public by some other hand.

The situation of that distinguished publicist is, at this moment, an altogether curious one. A ministry has lately been expelled; and in this expulsion he has borne a leading, not to say the principal, part. To have been, and to continue to be, in a pre-eminent, not to say a peculiar degree, the object of the monarch's confidence, has been, at the same time, matter of public and vehement accusation against him. Far from denying the fact, he openly avows it. "You know," says he, "what my opinions, what my affections are; you know that they are all liberal ones: your wish is, that the opinions — that the affections — communicated to your monarch, should be liberal ones; by whom can they be communicated, but by those by whom they are entertained? What would you be gainers, if your monarch communicated with none that were not your enemies?"

* See "*Three Tracts relative to Spanish and Portuguese affairs*" in this Collection.

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JEREMY BENTHAM

TO

THE SPANISH PEOPLE.

LETTER I.

On the Liberty of the Press—the approaching Eight Months' sleep of the Cortes — and the Exclusion of Experience from the succeeding Cortes.

London, 7th October 1820.

SPANIARDS!—The Madrid intelligence of the prosecution of a newspaper editor, for comments on the Madrid system of police, and of the introduction of the proposed law against political meetings, has just reached me. I am astounded!—What? is it come to this?—so soon come to this? The men being men, of their disposition to do this, and more, there could not be any room for doubt. But that this disposition should so soon ripen into act, this (I must confess) is more than I anticipated. Neither of the issue of the prosecution, nor of the fate of the proposed law, has the intelligence yet reached me. But that any such prosecution should have been instituted — any such proposed law introduced — that the impatience of contradiction, not to say the thirst for arbitrary power, should so soon have ventured thus far, — these, in my view, are of themselves highly alarming symptoms.

By the prosecution, if successful, unless the alleged offence have features in it such as I do not expect to find in it, I see the liberty of the press destroyed: by the proposed law, if established, I see the almost only remaining check to arbitrary power destroyed.

Taken together, they form a connected system — these two measures. By the authors of this system, you have of course been told, that it is indispensably necessary — necessary to *order*, to GOOD *order*, to *tranquillity*—and, perhaps, honourable gentlemen may have ventured so far into the region of *particulars* and *intelligibles*, as to say — to *good government*, and some other good things. — Spaniards! it is neither necessary, nor conducive to, nor other than exclusive of, any of those good things. What says experience? In the Anglo-American United States, of the two parts of this system, neither the one nor the other will you see. No prosecution can there have place, for anything written against the government, or any of its functionaries as such. No restriction whatever is there on public meetings—on public meetings held for any such purpose as that of sitting in judgment on the constitution — on any measures of the government — or on any part of the conduct of any of its functionaries. Yet, if there were a country in which these restraints, or either of them, would be necessary or conducive to good government, it would be *that*; for, in that country the people are all armed: armed, at *all times*, in much *greater* proportion than in any other country — armed, at *any time* they please, *every one* of them.

No: in that only seat of real and established good government (for yours, alas! is not yet established) — in that country, in which, ever since *that* good government was established—in which, for the forty years that it has been in existence, public tranquillity has not known what disturbance is, — there is no more restriction upon men's speaking together in public, than upon their eating together in private. People of Spain! do you know this? You scarcely do. But is it not high time you should?*

* *May* 31, 1821.—People of England! is it not high time that you too should know it? Well, then, so you shall, in so far as it is in my power to make you know it.

Here follows an extract from a pamphlet, printed, and, within a narrow sphere, for a particular purpose, some little time ago circulated, but not yet published: in a short time it is intended to follow the present one.

"Oh, but what is this you would have us do? Would you have us destroy the government? — would you leave the government of the country without protection? Its reputation, upon which its power is so perfectly dependent,—would you leave that most valuable of its treasures without protection?—would you leave it in the power of every miscreant to destroy it? In such a state of helplessness, is it in the nature of things that government should subsist anywhere?"

Subsist? Oh yes, everywhere; and be all the better for it. Look to the *United States*. There you see government, do you not? Well: there you see government, and no *libel law* is there:

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Both these lessons of experience you shall see more particularly in time and place: you will on that occasion see, in the same manner, a passage in history, an allusion to which is

the existence of the supposed deficiency you shall see; and where libel law is the article, you will see how much better *deficiency* is than *supply*.

In answer to a letter of inquiry written by me not long since — the exact time is not material, here follows all that relates to this subject, of a letter written by a person, whose competence to give the most authentic, and in every respect trust-worthy information on this subject, is not to be exceeded.

"Prior to what was commonly called the *sedition act*, there never was any such thing known under the federal government of the United States (in some of the individual States they have sometimes, I believe, taken place,) as a criminal prosecution for a political libel. The *sedition act* was passed by Congress in July 1798. It expired by its own limitation in March 1801. There were a *few* prosecutions under it, whilst it was in force. It was, as you have intimated, an unpopular law. The party that passed it went out of power by a vote of the nation in March 1801. There has been no prosecution for a political libel, under the authority of the government of the United States, since that period. No law known to the United States would authorize such a prosecution. During the last war, the measures of the government were assailed, by the party in opposition, with the most unbounded and furious licence. No prosecution for libel ever followed. The government trusted to public opinion, and to the spontaneous, counteracting publications, from among the people themselves, for the refutation of libels. The general opinion was, that the public arm grew stronger, in the end, by this course.

"I send you a volume of the laws of the United States containing the sedition act in question. It will be found at p. 97, ch. 91. You will observe a departure from the common law, in that *it allowed a defendant to avail himself of the truth of the charges contained in the publication*."

Thus much for my authority: whose name I cannot at this instant take upon me to make public.

Chap. 91. [XCI.] An Act in addition to the act entitled, "An Act for the punishment of certain crimes against the United States."[a]

Fine and imprisonment for unlawful combinations to oppose the measures of Government; or counselling, advising, &c. riot, insurrection, &c.

§ 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any persons shall unlawfully combine or conspire together with intent to oppose any measure or measures of the government of the United States, which are or shall be directed by proper authority, or to impede the operation of any law of the United States, or to intimidate or prevent any person holding a place or office in or under the government of the United States, from undertaking, performing, or executing his trust or duty; and if any person or persons, with intent as aforesaid, shall counsel, advise, or attempt to procure, any insurrection, riot, unlawful assembly, or combination, whether such conspiracy, threatening, counsel, advice, or attempt, shall have the proposed effect or not, he or they shall be deemed guilty of a high misdemeanour, and on conviction before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding five thousand dollars, and by imprisonment, during a term not less than six months, nor exceeding five years; and further, at the discretion of the court, may be holden to find sureties for his good behaviour in such sum, and for such time, as the said court may direct.

Offenders may be holden to find sureties, &c.

§ 2. And be it further enacted, That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing any false, scandalous, and malicious writing or writings against the Government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either House of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States; or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act; or to aid, encourage, or abet, any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.[b]

Fine and imprisonment for printing, &c. false, scandalous, and malicious writings, &c. against the Government, Congress, &c.

§ 3. And be it further enacted and declared, That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence, in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

The defendant may give the truth in evidence, &c.

The jury to determine the law and the fact, &c.

§ 4. And be it further enacted, That this act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer: provided that the expiration of the act shall not prevent or defeat a prosecution and punishment of any offence against the law, during the time it shall be in force. [Approved, July 14, 1798.] In

Limitation of this act to the 3d March 1801: provided, &c.

[a] Expired. See Orig. Act of 30th April 1790, chap. 36, page 92, vol. ii.

[b] See the Constitution, Amendments, art. 1, page 72, vol. i.

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all that room can be found for here. A law had been passed, authorizing prosecution for the sort of offence, prosecuted for, as above, among you. Under it, one single prosecution took place — it failed: the law was repealed — the authors of it lost the public confidence, and with it their political influence.

I. As to the restraints on constitutional liberty, that my conception of the matter may at once be seen in its utmost extent, I shall, in the present letter, state at once the measures which I would venture to recommend for examination. But, in the meantime, it may be some satisfaction to you, to see before you an outline of the considerations by which the wish to see some such measures carried into effect has been produced.

First, as to the liberty of the press.

Every expression betokening disapprobation of the texture of the government, or of the conduct of any person bearing a part in the exercise of the powers of government, conveys an imputation on *reputation*—on the reputation of the persons at the head of the government. This cannot be denied: for as at all times the texture depends upon the person so situated, in proportion as the texture is ill adapted to the only proper end of government, so are *they* to their situations: and between one degree of disapprobation and another, it is not possible to draw a line. Accordingly, any such expression is, at pleasure, commonly considered by them in this light, and punished. If the imputation is to a certain degree, particular, — imputing an individual act legally punishable, or at least disreputable, — it constitutes the sort of act expressible by the term *defamation:* if to a certain degree vague and general, *vituperation*. But these sorts of acts are, both of them, commonly treated on the footing of offences: and this, too, even where the person who is the subject of the imputation is a private individual, not bearing a part in the exercise of any of those powers.

On this subject, the following are the assumptions that, in governments in general, seem commonly to have been made:—

Whatsoever be the treatment of an offender, in the case where the party offended is but a private individual, in the case where he is a public functionary — especially if spoken of as such, much more if the whole body of the rulers, or those at the head of it, are the parties offended, — the offence is more mischievous, or, on some other account, creative of a demand for a stronger repressive force, in the shape of punishment, as well as in all other shapes; and this force ought to rise in magnitude as the rank of the person offended rises; and the judicatory, by which cognizance is taken of the offence, should in this case be different; as also the forms of procedure different.

My notion, as confirmed by the practice of the Anglo-American United States, is, in all those particulars, the reverse. In the case of the public functionary, for *vituperation*, how gross soever, there should be no punishment at all: for defamation, no punishment unless the imputation be false and groundless; nor even then, unless the false assertion, or insinuation, be the result of wilful mendacity, accompanied with the consciousness of its falsity, or else with culpable rashness — namely, with that which is exemplified by the giving credence and currency to an injurious notion, adopted without any, or on palpably insufficient grounds: no separate judicatory: no separate form of procedure, styled *penal* or *criminal*, while, in the other case, it is styled *civil;* and, in the case of *defamation*, in disproof of rashness of assertion, as well as of wilful falsehood, the defendant should be at liberty to make proof of the truth of the imputation; and, for that purpose, to extract evidence from the person who is the subject of it, as he might from any other person at large.

For these notions, speaking in general terms, my reason is — that to place on any more advantageous footing the official reputation of a public functionary, is to destroy, or proportionably to weaken, that liberty, which, under the name of *the liberty of the press*, operates as a check upon the conduct of the ruling few; and in that character constitutes a controuling power, indispensably necessary to the maintenance of good government.

Speaking more particularly, whatsoever evil can ever result from this liberty, is everywhere, and at all times, greatly outweighed by the good.

1. The good, consisting, as it does, in the security thus afforded for good government; and covering, as it does, the whole field of government, is plainly infinite.

2. In comparison with this good, the utmost evil that from this cause can result to any person, or to any number of persons, however situated, would, even if altogether unaccom-

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In the above letter, in speaking of the execution given to the liberticide law that has just been seen, the word *prosecutions* (it may have been observed) stands in the plural number. On the other hand, while writing this letter of mine to the people of Spain, my supposition was — that there had not been any more than one. The conception had been derived from a conversation with another United States' functionary of the highest distinction; on the occasion of which conversation, *one* prosecution had — possibly in his eyes, certainly in mine — eclipsed the other, or the few others. The case was that of a prosecution instituted by the Marquess of Casa Yrujo, in his quality of Minister from the court of Madrid to the republic of the United States, against some individual (name not recollected) for a libel on the Spanish government. The defendant was acquitted.

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panied with compensation, be comparatively minute.

3. In the elevated situation in question, whether the imputation be unmerited or merited, the nature of his situation furnishes a man with means of support and defence, — and in so far as the imputation is false, means of disproof and refutation, — increasing with the height of his situation; and, at any rate, much beyond any which can be within the reach of an individual not so situated.

4. In every such situation, immediately upon his advancement into it, and therefore antecedently to his becoming the object of any such imputation, a man finds, in the advantages attached to such his situation, a compensation for all the evil to which, in this, and all other shapes taken together, he stands exposed by it.

5. The higher the situation, the more abundant the antecedent compensation it thus puts him in possession of.

Against the allowance of this liberty, considered with a view to its effect on the goodness of the government, no arguments that have been or may be adduced, will bear the test of examination.

1. First comes *dangerousness*. Dangerous, it always and everywhere is: for it may lead to insurrection, and thus to civil war; and such is its continual tendency.

Answer: In all liberty there is more or less of danger: and so there is in all power. The question is — in which there is most danger — in power limited by this check, or in power without this check to limit it. In those political communities in which this check is in its greatest vigour, the condition of the members, in all ranks and classes taken together, is, by universal acknowledgment, the happiest. These are the Anglo-American United States, and the kingdom of Great Britain and Ireland. In the republic, this liberty is allowed by law, and exists in perfection: in the kingdom it is proscribed by law, but continues to have place, in considerable degree, in spite of law.

Take away this check, there remains no other but the exercise of this same liberty by speeches in public meetings: and in that shape, besides that it is not applicable with nearly equal advantage, it is much more dangerous.

II. Next comes *needlessness*. To the prevention of misgovernment, the other remedies that government itself affords, are adequate.

The rulers in chief, whoever they are, have nothing so much at heart as the happiness of all over whom they rule: and that wisdom by which they are informed of the means most conducive to that end, is in them perfect; or, if not absolutely free from all imperfection, that endowment is in their situation much more so, than in that of the subject-many.

This being assumed, — in this union of all the elements of official aptitude — (appropriate probity, appropriate intellectual aptitude, and appropriate active talent) — with uncontrouled power in the persons of the *rulers in chief*, the subject-many possess an adequate security against any want of correspondent aptitude in the persons of their several *subordinates*. In case of simple inaptitude, removal will follow: in the case of inaptitude, coupled with delinquency, prosecution, and thence punishment, will follow.

Answer: The rulers in chief, whoever they are, if they are men, have their own happiness more at heart than that of all over whom they rule put together: the very existence of man will in every situation be found to depend upon this general and habitual self-preference.

As to *wisdom*, it can never be so near to perfection without, as with these all-comprehensive means of information, which nothing but the liberty here in question can give.

Upon exertion depends the possession of all the several elements of official aptitude above mentioned, and in particular the acquirement of the appropriate information, as above. But the higher the situation, the less is the exertion which he who is in it is disposed to apply to the functions of it. For the higher the situation, the less he has to apprehend for himself in case of demonstrated inaptitude in any shape.

Without this liberty, the rulers in chief will not be sufficiently either disposed, or enabled to apply, so much as simple removal, much less punishment, for remedy against inaptitude on the part of their subordinates. Beholding in those subordinates, so many ever-obsequious instruments in their hands — instruments continually applicable to their own personal purposes — the rulers will naturally and generally feel more sympathy for them than for the people at large: they will not be disposed to remove or punish them, merely for acting against the people's interest; much less for acting in favour of the separate and sinister interest of these same rulers: as where the rulers themselves engross or share the profit of the offence.

To the formal prosecution at the suit of rulers, — and, where allowed, at the suit of subjects, — the informal informations, which it is the property of this liberty to supply, constitute, in one case, an assisting support — on the other, a succedaneum and substitute. Destitute of this assistance and this substitute, prosecution, even when not refused, is at once insufficient and over expensive. So small as is the number of prosecutions, compared with that of delinquencies, the delay, vexation, and expense attendant on them, compose no inconsiderable evil. What, if such prosecutions were as numerous in proportion

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to delinquencies, as under the liberty in question these *informations* are, that are given by the exercise of it? Under the least bad systems of judicial procedure extant, the prosecutions teem with factitious delay, vexation, and expense, over and above what is natural and necessary. Attendant on informations, there is neither factitious expense, nor factitious delay: vexation, there is comparatively little — none but what is proportioned to delinquency, and stands in lieu of punishment.

For the establishment of the truth or falsity of the imputation — for the establishment of the guilt or innocence of the party suspected of delinquency — the utmost stock of relevant and applicable facts and arguments that can be secured by prosecution, is very imperfect without the addition of those which this liberty and nothing else is capable of supplying.

II. So much as to the liberty of the press. Now as to the liberty of public meetings.

Without much variation, the arguments that apply to the former of these two branches of personal liberty and constitutional security, apply to this. But of this branch the extinction is already known to have been taken for the object, as well as subject, of an already *proposed* law: and, ere this, the object may have been effected by an *established* law.

In support of this extinction, the English newspapers have brought to my view a system of argument, stated as having been employed by various public functionaries. To these, after holding up to view the proposed law in what seems to me its proper colours, I propose to give a distinct consideration in another letter.

From one who, in regard to the individual facts of the case, has no other information than what is above alluded to, any observations made in such circumstances are not altogether out of all danger of being regarded as ungrounded; and to such a degree, as to be destitute of all claim to notice. But — such is the nature of man when clothed with power — in that part of the field of government which is here in question, whatever mischief has not yet been actually done by him to-day, he is sure to be meditating to-day, and unless restrained by the fear of what the public may think and do, it may actually be done by him to-morrow. Of the documents which form the subject of the ensuing remarks, it is impossible for me to say to what extent the accounts that have reached me may not be incorrect. So far as regards individuals, these remarks must therefore from first to last be considered as no other than *hypothetical*, depending for their appositeness upon the correctness of the reports respectively given of these arguments. But if, considered as applied to the arguments themselves, the remarks should be found justly applicable, the fact, that on the particular occasion in question, the arguments were not actually employed by the persons to whom they stand ascribed, will not detract much from the value of any information which the remarks may be thought to afford. Ungrounded in the character of a *censure*, in that of a *warning*, the remark may not the less have issue.

MEASURES PROPOSED.

1. In regard to liberty of writing and speech on political subjects, repealing what requires to be repealed, place matters exactly on the same footing as that in which they are in the Anglo-American United States. And, to narrow the inquiry, let the footing be that on which they are in the territory immediately under the government of Congress, and where the subject of discussion is the conduct of the members of the ruling body, so denominated, or any of the official persons subject to their controul.

2. In regard to assemblies in particular, insert a declaration, giving the people the assurance that, forasmuch as there exists not any law to the contrary, they remain at liberty, at all times, and in all places from which they are not excluded by special ownership, to meet, for the purpose of delivering their opinions, in the freest manner, on the conduct and character of their rulers; — at any rate, of all such of their rulers as are, or may be, the objects of their choice, in the character of representatives, as also of all such other persons as are subject to the controul of such their representatives. And let it not be forgotten, that all persons thus chosen are thereby not their masters but their servants. In regard to secresy, insert, moreover, a declaration that, for keeping their proceedings as secret as they please, they may take what precautions they please, so that no engagement, wearing the form of a religious oath, be employed: nor any scheme entered into, for the performance of any act importing bodily or other injury to any individual, or on any other account forbidden or made punishable by law, be in the number of their objects. And note that, in regard to secresy, on this footing stands, in England, the unreproached, and irreproachable society of Free Masons.

In the United states, whoever thought, either of instituting secret societies, or of being jealous of them if instituted? Of secresy under such a government, what could be the object? Secresy in subjects, supposes tyranny in rulers.

Under these circumstances, what fills me with apprehension is — the approaching nonentity of the Cortes. The only bridle to ministerial despotism taken out of its mouth,

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without a possibility of being replaced for eight months to come! Now, if they had but the possibility of existence, now then would be the time for meetings of the people for petitioning the Cortes not to desert its post.* Now would be the time for saying to them, "Do not, in deference to the rash and ill-judged—the suicide letter of the constitution, risk the destruction of the constitution itself, or at least of the most essential portion of what is good in it!" True it is, that in the Cortes I see an authority, under the eye of which the liberty of the press has, I much fear to find, been sadly weakened, and perhaps destroyed. True it is, that in the Cortes I see, at any rate, an authority by which the liberty of public discussion has without reserve been taken away. True. But in the Cortes I see an assembly in which, so long as it is sitting, it is at all times in the power of any one member to use his endeavours for the restoration of the banished liberties, and to spread over the whole kingdom the arguments on which these endeavours are grounded.

By this strange article of the constitutional code, the Cortes, the only assembly in which, should misrule reasume its recent enormity, the voice of complaint can be heard, is laid asleep, is reduced to a state of nonentity for eight months.

And, during these eight months, what are the hands in which all the powers of government are lodged? The self-same hands in which till t'other day they were employed—it is needless to say how. By article 171 (power the 5th,) to the king it belongs "to fill up all civil and military employments:" amongst others, therefore, the employments of the seven "Ministers of State and of Public Affairs;" those seven ministers, by whom taken collectively, during this long sleep, as well as after the death of the Cortes, the whole mass of the powers of government is exercised. These powers the king may at all times collectively and individually take, and at each moment lodge in any hands he pleases. To this choice I am unable to find any the smallest check.

I see, indeed, a council of state, which in art. 237, by a provision not very consistent in its terms with the terms of that same 171st article, shares with the king the power of conferring ecclesiastical benefices and offices of judicature: as if offices of judicature were not civil employments—as if this were not enough, supposing the unofficial advisers of the crown to be again what they were so lately, and suppose at the same time, that in the whole court and country, persons in so large a number as seven are not to be found suitable to the purpose of giving to the whole power of government an exercise similar to that which was so lately given to it—one single minister, unless prevented by some regulation, no tidings of which have reached me, may, under this same constitution, be made sufficient. For, by art. 224, "By a particular regulation approved by the Cortes *will* be pointed out," it is said, "the business peculiarly appertaining to each minister." But till such demarcation has been made by the Cortes, everything is left at large, and to any one or more of the seven, as much of the power of all seven may be given as those same irresponsible advisers shall advise: and amongst the rest, the filling up, and for aught appears, after having emptied them for the purpose, "*all civil and military employments:*" under *civil*, *ecclesiastical*, and *judicial*, being respectively included, or not included: let those who are sure, say which.

"What?"—says some one—"have you then really any such fear, as that of this eight months' sleep of the Cortes, the restoration of the recent habits of government will be the consequence?" No; I have not: for, how small soever may be the regard of the men in question for the security of the *subject-many*, their regard for their own security will be not the less; and I see not by what means any tolerably effective provision can be made for it, unless it be such by which, along with the ruling few, the subject-many will be secured, at least against any condition equally disastrous with that from which they have so lately emerged.

But, knowing little more of them than that they are men, what I am afraid of is this—namely, that in the situations in question, men will do what all men would be disposed to do in their places:—that they will embrace every opportunity for sacrificing the interest of the whole community to their own particular interests: that in particular, they will give the utmost magnitude possible to the mass of useless and needless offices, and to the emolument of those same offices, as well as to that of useful and needful ones: that they will dispose of offices for their own profit, either in a direct way by selling them, or,—in a way not less effectual by being indirect,—by giving them to persons in dependencies, or otherwise in private connexion with them, be the persons ever so apt or ever so inapt, for the functions

* In fact, the Cortes did not desert its post. In deference to the constitutional code, the members forbore to promulgate acts in their corporate character, but, consenting to the return of the smaller part of their number to their constituents, a considerable majority remained in the capital, continuing their consultations: and it was by their interposition that it was preserved from the hands of a governor, nominated—not less pointedly against the letter than against the spirit of that code, by the monarch alone, without the concurrence of any other constituted authority in that behalf appointed.

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of those same offices: and that, to the same end, they will give and secure to every other branch of expenditure every practicable increase, and to retrenchment every practicable diminution: that, with or without just cause, should there be any persons to whom it has happened to incur their displeasure, they will let slip no opportunities of allaying it by vengeance: and that, in a word, they will do as those do and have been used to do, under whom it has hitherto been my good hap to live unhanged, unsabred, unimprisoned, unbanished, and unruined.

This is not all. For giving permanency to a system of this sort, these instruments of monarchy would scarcely feel sufficient confidence in their own force: they would look out for coadjutors in the aristocracy; and thus, in the union of the monarchical with the aristocratical interest, you would see and feel, as here, an alliance defensive and offensive against the interest of the people—of the ruling one and the sub-ruling few, against the subject-many. They would call to their aid the landed proprietors of the country as such, and in particular the proprietors of the vast overgrown properties. In these they will find not only natural allies, but sure, and perpetual, and steady, and in every respect matchless ones. The possessor of an office, howsoever abundant in power, may be removed out of it at any time, and without so much as the imputation of injustice. Not so the great landholder — the proprietor of a tenth part, an eighth part, or a fourth part of the land of a whole province; and with it of a proportionable mass of political influence. But neither time nor space will here permit me to enter into any detail of the mischiefs with which such a confederacy is pregnant: except to conclude with saying — that the last, though not the least of my fears is — that, to give completeness to the system, the measures which, at the instance as it seems of these same ministers, have, I fear, already been taken by the majority of the Cortes for the extinction of all power of controul in the hands of the people, may, by means of such an alliance, be carried into full execution, and perfected and perpetuated.

Another set of fears, though not quite so intense as the foregoing, remains still behind — that they will give to those natural enemies of the people the fullest security that can be given to them against any idea so intolerable, as that their as yet unborn descendants will find themselves unloaded with wealth, no prospect of which can ever have entered into their minds: that they will secure them against so cruel an apprehension as that all their children but one should not always be impoverished for the benefit of that one; and against the still more intolerable apprehension, lest their creditors should receive any part of the amount of their just debts: that, in atonement for the injury thus done to their thus impoverished children, they will secure to them, at the expense of the still more impoverished lower orders, a stock of sinecures of all classes: matter of emolument granted at the expense of the State, on pretence of rendering to man some service never rendered, or on pretence of rendering some pretended service to that Being to whom all service is unprofitable: and, to crown all, that having with such efficient anxiety provided for keeping them stocked as richly as may be with the benefits of political society, they will join in securing to them an exemption as extensive as may be from its burthens.*

No: nothing can be more inconceivable to me than the grounds, if they were good and avowable ones, on which, for two-thirds of every year, the power in which you, the people, see your only hope, should be reduced to perfect nullity;† and of all times, this too at the very commencement of the system on which all hope of salvation rested: as if, for eight months in the year, all sheep dogs were to be kept locked up, and the sheep committed during that time to the guardianship of the wolves. At no time, surely, nor in any nation, can there have been, or can there be, so much work to be done: and at this time it is, that, of the quantity that might have been employed in work, two-thirds are taken off; and taken off with every mark of anxiety, — consecrated to idleness.

With us in England, where everything, how ill soever, is so fully and permanently,

* Before this letter was sent off, grounds were received for the hope, since confirmed, that this set of fears might, for the present at least, escape being realized. In the copy that went to Madrid, this paragraph was accordingly omitted. But under the Matchless Constitution, the envy and admiration of the world, let English readers, especially those by whom the endeavours of Romilly were followed by sympathizing eyes, say whether there are any of these fears on which the imputation of being imaginary can be fastened.

In the Anglo-American United States, an effectual door has been for ever shut against all such fears.

To come back to the main point, and conclude. The last, though not the least, of all their fears is — lest un-measures, which, at the instance, as it should seem, of these same ministers, have already been taken by the majority of the Cortes, for the extinction of all power of controul, have, by means of this too natural alliance, been carried into full execution, and perfected and perpetuated.

† In its corporate capacity, accordingly, so it was: in consequence, the constitution would have been destroyed, had not the members of the Cortes, in their individual capacity, continued at their post, and saved it and themselves in the manner mentioned in a former note.

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and for so vast a length of time has been, established, the whole year may, if so the king pleases, be employed in doing (with the exception of giving him a new wife) whatever else he pleases.

Strange as it is, the article by which, at the time when the demand for experience, and for the talents formed by it, stands at its highest pitch, the next succeeding Cortes is so anxiously deprived of all the experience and talent acquired in the present, is not quite so strange. In a jealousy entertained of the probity of these first objects of the people's choice, I can conceive a possible, howsoever indefensible cause of it. But while the jealousy, of which the persons chosen by the people are the objects, is so broad awake,—that all jealousy of those against whose power these same objects of the people's choice are to afford the sole security, should be so perfectly asleep,—this is the thing that astonishes me: that such jealousy and such confidence should at the same time have found place in the same bosoms.

No: it is not so much of a monarch that I am afraid, for he is mutable: it is of the aristocracy that I am so much afraid; for *that* is immutable. It is itself immutable: and no less immutably adverse is its interest to the interest of the people.

Postscript. This moment, comes information of the decision of the Cortes, in relation to the Persas; and, of the whole number of 69, not more than one is to be so much as prosecuted. At their own homes they are to continue; and there, should his Majesty have any fresh occasion for their services, there he knows where he may be sure to find them. Nothing can be more merciful—nothing more convenient. Now, if from this mercy no mischief to the people shall ensue, whosoever else may be dissatisfied with it, I shall not be so. It is not for any pleasure I can take in the contemplation of what he suffers, that I would punish the most mischievous of criminals. But a question I cannot help putting to myself is,—If, under the Constitution, those who seek the forcible destruction of it have nothing to fear, while he who seeks the preservation of it by means not acceptable to those by whom this impunity has been granted has much to fear, what chance has it for continuance?

Any leading member, in gratitude for all this mercy,—has it happened to him to have received, or to be about to receive, a requital in any shape from any of those who have been preserved by it? If any such gratitude has been manifested, so much the better, and it cannot be too extensively known; for, the more expensive the gratitude, and the more extensive the knowledge of it, the more extensive will be the assurance, that should any such attempt to destroy the constitution be repeated, and success fail of crowning the attempt, the impunity will not be entire.

LETTER II.

On the Liberty of Public Discussion in Free Meetings.

18th Oct. 1820.

SPANIARDS! I continue.—My former letter was principally allotted to the liberty of the press. Intimation was there given, that the arguments pleading in favour of that branch of personal liberty and constitutional security apply with little variation to that which forms exclusively the subject of the present letter. The proposed law, as it stood in four articles, together with the speeches by which I found it supported, will constitute the text of this discourse.

I commence with the proposed law itself: the text of it, in the state in which, on the 21st of September 1820, according to the English translation, it came out of the hands of Mr. Goreli—(Traveller, Oct. 6, 1820.) "The law regarding public societies," I see it termed. The law for the *prevention* of popular assemblies, it might have been termed; for, of this law, what is the object? what the declaredly intended effect? In respect of this security against misrule, to place the people of Spain exactly upon the same footing as the people of Morocco. Yes; exactly upon the same footing as the people of Morocco: this you will see. Four, and no more, is the number of its articles: these are quite sufficient. Give but to language the extent it is susceptible of, the fewer the words, the greater the effect. Think of this, ye who, to make display of your humanity, complain of the multitude, nothing but the multitude, of penal laws. Draco made but one: Death is for him who breaks any one of my laws.

"Art. 1. All Spaniards will have the right of speaking on political affairs by conforming to the disposition of the law." Good: and so have all the Moroccans. What is it, this same disposition of the law? Wait to the next article but one, and you will see it.

"Art. 2. Every assembly not authorized by law will immediately cease." If so, and without revival, then will, ere long, the constitution itself cease, or at least everything that is good in it.

"Art. 3. Meetings shall not take place but in virtue of the *permission* of the local authority, who will take the necessary measures to guarantee the public tranquillity." The person or persons in whose hands the local authority is: suppose, then, his own conduct among the proposed subjects of complaint—his own conduct, or that of any person or persons to whose power or influence he stands subjected, or that of any person or persons

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who stand subject to his power or influence, unless they happen to have incurred his displeasure: this indispensable permission when and how often will it be given to it?

In the whole kingdom, or in this or that part of it, suppose these functionaries, all or any of them, in a league to betray their trust, and abolish or otherwise render of no effect all that is good in the constitution, how many of these assemblies will respectively be permitted to be held?

Take the necessary measures? O yes, *that* he will. Of those who would have attended the meeting, he will exclude one part—he will keep the rest under a guard. By this means, those, and those only, will be there, who are of the same way of thinking, or at least of speaking. "Measures to guarantee the public tranquillity." O yes: doubt not but that by measures such as these, the public tranquillity will be preserved. As to permission, —in every case in which there is neither need of, nor use in, any such public meeting, *permission* will be ready for it: in every case in which there is need of it, or use in it, *punishment* will be ready for it.

"Art. 4. Nevertheless these societies, authorized by the competent authority, will not be regarded as corporations."

So then, according to the honourable gentleman, if men, in any number, however great or ever small, are but suffered to meet together, whether at stated times or by accident, for the purpose of conversing, and conversing accordingly, on the state of the nation, there needs no more to constitute them *a corporation:* to constitute them a corporation — or at least to give to the assembly an appearance so near to that of a *corporation*, as to produce a danger of its being taken for such, and *that* with mischievous effect.

Lawyer or non-lawyer, in the mind of the honourable gentleman, can it really have been a subject of belief, that, by any such means, in the sense put upon the word *corporation* by the law of his country—by the Rome-bred law, or by any other sort of law—a *corporation* would or could thus be constituted, or that to any other reflecting mind it could be taken to be so? I have tried hard, but I have not as yet been able to find in any such supposition the faintest colour of probability. But if not,—I grieve to think of it—what is the consequence? That, on the occasion of the *insinuation* thus conveyed for the purpose of gaining his point, and deluding into an acquiescence with a liberticide law his colleagues of the Cortes and the Spanish people their constituents, he had recourse to misrepresentation, wilful and studied misrepresentation. To the people, to induce them to sit still, and, without previous remonstrance or subsequent complaint, see themselves deprived of a real and indispensable security, he held up to view a danger purely imaginary, and known by himself to be so: at the same time, to effect this liberticide purpose, he scrupled not to use his endeavours to cause those whom he was depriving of their liberty to be regarded as a set of conspirators and usurpers, conspiring to assume and exercise an illegal power, for the purpose of employing it in acts of hostility against the government.

Oh but, as often as it pleases the local authority that any such assemblies shall be held, and to give permission accordingly, held they will be, or at least may be. Oh yes; that they may; held in Spain they may be, and so they may be in Morocco.

The Emperor of Morocco,—is he in want of a prime minister? Let Mr. Goreli tender his services. But, perhaps, he may be provided nearer home.

But the law is Mr. Goreli's, and he has given us his reasons for it. Let us see them. [From the Traveller, 21st September 1820: Madrid, Sept. 6.—The Cortes—Sittings of the 4th.]

"M. Goreli allowed that the members of the societies and their objects deserved respect and confidence;—2. That they took every precaution to admit none but persons of upright intentions and devoted to the constitution;—3. But that they were exposed to be taken by surprise by some, who, under the appearance of patriotism, *might* lead them to impolitic conduct."

Such are the premises: and his conclusion is what has just been seen.

And is it come to this? And did such logic then come from Spaniards?—and without fear of universal indignation, could it thus be presented to Spaniards? And so it is from these premises, that this same practical conclusion has been derived! These societies are to be annihilated! All societies of this description—all that now exist, and all that would otherwise have existed, plunged together, and forever, into one and the same bottomless pit—consigned for ever to annihilation!—People of Spain! this same logic—would you see it in its true character? This you may do, and without much difficulty. Apply it wherever else it is equally applicable, and observe the effect of it. Apply it then to the Ministry,—you annihilate the Ministry: apply it to the Cortes,—you annihilate the Cortes: apply it to the Monarchy,—you annihilate the Monarchy. Yes, the Monarchy; for was there not a monarch once, who was not merely "exposed to be taken," but actually "taken by surprise?" But why thus spend time in taking men one by one? Apply it to human kind, you annihilate human kind. Would you give a top to the climax—apply this same logic to the maker of it: apply it to Mr. Goreli, you annihilate Mr. Goreli. For is not even Mr. Goreli *exposed* at least to be

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"*taken by surprise*," and "*led into impolitic conduct?*" Ah! why was it not applied to him—this logic of his—and applied with somewhat more than *logical* effect, before he introduced this law? Was it that even *he* was taken by surprise, when he was "led into the conduct" manifested by the framing and proposing of such a law? Ah no! I see but too much of *reflection* in it—but too little of *surprise*.

"Deserving of respect and confidence,"—themselves as well as "their objects:"—"careful to admit none but persons of upright intentions, and devoted to the constitution:"—"exposed," but only exposed "to be led to impolitic conduct:"—led by *some*, but only by *some*, "among them," and by them no otherwise than by being "*taken by surprise:*"—such, according to Mr. Goreli, is the general character—not only of the societies, but in each society, that of the members! Such their character, and, notwithstanding their being all this—if not for their being all this—for this it is that they are annihilated! What had their characters been the very opposite of all this?—what worse could, even in that case, have been done to them? And because in—it is not said how small—a number, they are *exposed* to be taken by surprise, their general excellence being at the same time thus admitted and proclaimed—it is for this, *that* not only all that *exist* are at once to be consigned to nihility, but all that otherwise *would* have existed.

Well, then, the "impolitic conduct" they are exposed to be led into; together with whatever mischief might have been the result of it—what would have been the cause of it? "*Surprise*," answers Mr. Goreli himself—their "*being taken by surprise*." Well; and suppose them *not* so taken, what would have been the mischief? I answer—there would not have been any: even Mr. Goreli does not say there would. Against *surprise*, then, is there no other remedy—no remedy less drastic—than annihilation? Under the name of *warning*, does not the nature of the case present a somewhat better known and better approved, as well as milder remedy? Thinking as Mr. Goreli declares he thinks of them, some men in his place would have preferred *giving warning*. Mr. Goreli applies *annihilation*.

On this occasion, as on all similar ones, behold the same inexorable passion, and the same course taken by it: the elevation gained, at the first opportunity the ladder by which it was gained, is kicked down. On this same occasion, this is more explicitly confessed by other speakers. Excellent things those same societies, while occupied in laying the foundation of our power: deserving of annihilation, the moment it is perceived that, from the same useful and so lately necessary instrument, that same power is exposed to feel a check.

Take warning, Neapolitans! take warning, Portuguese! for warning you shall have; and for your beacon, you shall have the Spanish Cortes, with Mr. Goreli speaking the sense of it. Take warning—I know not whether to say, Spaniards!—for, alas! for *you*, I fear, it is too late: unless, by favour of Spanish dispatch, some of the elements of the La Isla army should still continue undissolved.

Still the same division—the same most simple and commodious division—of human kind into two classes: the *good*, those by whom our purposes are served; the *bad*, those by whom they are thwarted: and, no sooner is it seen or thought, that the *good* creatures, who till this moment served our purposes, thwart them, than their essence is changed, and they are become *bad* ones. Yes: this is the division you may see made by legitimacy all the world over. *Above*, all excellence; *beneath*, all depravity. Such is the arrangement—the systematical arrangement—of which Despotism is the Linnæus. In the English statute book, not a page in which it is not assumed and acted upon. Most excellent Majesty! O yes! most excellent: but Most Excellent in what? And from Majesty down to simple Knighthood runs the scale of excellence.

Spaniards! would you wish to see the difference between a despotic government and an undespotic one? You shall see it in few words. It was not made for *this* purpose; it was not made for *a* purpose; it was made for *all* purposes. Be this as it may, if it be admitted (the account thus given of this difference,) the sort of government which, by this law of his, Mr. Goreli has been endeavouring to establish—and, I much fear, has ere now established—is a *despotic* one. Yes: notwithstanding everything that is to be found in your constitutional code, a despotic one. The letter of that code may be left to you, and still the government may be a despotic government.

Would it be agreeable to you, moreover, to have at hand a *test*, by which the partisan of a despotic government and the partisan of an undespotic government, or (to use a more common phrase) a lover and a hater of liberty may be distinguished? Such a test you shall see: and if you approve of it, occasions will not be wanting for making application of it.

Time presses, space is wanting. The form I give it in must be as compressed as possible. It will not be a substitute to thinking, but an excitement. Be indulgent: be expectant: I cannot, in so narrow a space, do the argument anything like full justice.

Spaniards! behold, then, the distinction

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between a government that is despotic, and one that is not so. In an undespotic government, some *eventual faculty of effectual resistance*, and consequent change in government, is purposely left, or rather given, to the people.

Not inconsistent with government—on the contrary, indispensable to good government, is the existence of this faculty. Not inconsistent: for so experience, as you will see, proves.

Next to nothing is the danger from the existence, in comparison with that from the non-existence of this faculty. Everywhere, and at all times, on the part of the subject-many, howsoever treated, exists the disposition to obsequiousness. *Birth*, observation of the direction taken by *rewards* and *punishments*, by *praise* and *dispraise*, of the habit and language of all around;—by the concurrence of all these causes is the disposition produced, and kept up.

To alter or weaken this disposition, in such sort as to produce revolution in government, or considerable mischief to person or property of individuals, nothing ever has sufficed, or ever can suffice, short of the extremity of misrule.

Upon this principle alone could, or can, the English revolution be justified.

Upon this principle alone can the like change in Spain be justified.

No such past change can be justified, but by a principle by which the justification of all future change in like circumstances is already made.

Of a government that is not despotic, it is therefore the essential character even to *cherish* the disposition to eventual resistance. On some other occasions you shall see —such of you as will honour my pages with a glance—how effectually and pointedly that indispensable element of security has been cherished; cherished by the only government that stands upon a rock—the government of the Anglo-American United States. Meantime see to this purpose—such, if any of you, as have in hand the means—the liberticide Act of Congress, *approved July* 14, 1798; not forgetting the marginal note indicating the glorious *expiration* of it.

Instruments necessary to the existence of such a disposition, in a state adequate to the production of the effect, are *instruction, excitation, correspondence*. To the understanding applies instruction; to the will, excitation: both are necessary to appropriate action and correspondent effect; instruction and excitation, in the case of each individual taken separately; correspondence, for the sake of concert amongst the number of individuals requisite and sufficient for the production of the ultimate effect. Co-extensive with the instruction and excitation must be the correspondence: and therefore, as far as depends upon the government, under the government, if not a despotic one, will be the facility allowed and afforded to correspondence. When, to a national purpose, exertions on a national scale are necessary, exertions made without concert (need it be said) are made without effect.

By instruction, excitation, and faculty of correspondence—by these three instruments in conjunction, and not by any one or two of them alone—can the national mind be kept in a state of appropriate preparation—a state of preparation for eventual resistance. It is by the conjunct application of all these instruments, that minds are put and kept in a proper state of discipline, as bodies are by the military exercise.

From this state of full and constant preparation, result two perfectly distinct, though so intimately connected uses:—1. Effecting a change in government, if ever, and when necessary; 2. In the meantime, preventing, or at least retarding, the necessity, by the constant application of a check to misrule as applied to individual cases—to misrule in all its several shapes.

Necessary to instruction—to excitation—in a word, to a state of preparation directed to this purpose,—is (who does not see it?) the perfectly unrestrained communication of ideas on every subject within the field of government; the communication, by vehicles of all sorts—by signs of all sorts; signs to the ear—signs to the eye—by spoken language—by written, including printed language—by the liberty of the *tongue*, by the liberty of the writing-*desk*, by the liberty of the *post-office*—by the liberty of the *press*.

The characteristic, then, of *an undespotic* government—in a word, of every government that has any tenable claim to the appellation of a *good government*—*is*, the allowing, and giving facility to this communication; and this not only for instruction, but for excitation—not only for instruction and excitation, but also for correspondence; and this, again, for the purpose of affording and keeping on foot every facility for eventual resistance—for resistance to government, and thence, should necessity require, for a change in government.

In all this there is nothing new: nothing that is new, either in theory or in practice. Look around you, my friends, you will see it in theory, and at the same time in correspondent practice. In the Anglo-American United States, everybody sees it is in practice. In that declaration of independence, which stands at the head of their constitutional code, anybody may see it plainly and openly avowed. Not that I wish to be understood as holding up as a pattern, the *logic* of that document. But, at any rate, there is *thus much* in it

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of *good politics*. After speaking of certain "*ends*,"—meaning, beyond dispute, though not very appositely expressing, *the greatest happiness of the greatest number*, (a phrase for which, upwards of fifty years ago, I became indebted to a pamphlet of Dr. Priestley's,) it proceeds to say—"Whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government." Thus it is, that in express terms, and with the most direct and deliberative intention,—thus it is, that with discernment as well as magnanimity till then unexampled—*that* government—(a government under which, during the forty years that it has been in existence, there has been more felicity—more undisturbed tranquillity, than during the same period under any other,) *that* government, let it never be out of your minds, has, with its eyes open, and with its own hands, laid the foundation of eventual resistance to itself. Even in England, even in the records of the English parliament, may be seen something of a show of it. At the time of the revolution, those who bore a part in that change saw their convenience in holding a sort of language from which the same conclusion was drawn; namely, that a state of things had at that time already taken place, and was therefore capable of taking place,—was then in contemplation, and therefore might and ought to be, upon occasion, taken again into contemplation—in which it might be right that the people should take the government into their own hands: an operation which, of course, could not be performed without *resistance* to the government then in existence. The logic, indeed, was in this case still worse than in the American case. For a falsehood was asserted: and that a notorious one; namely, that the king had entered into a contract with the people: whereas, to the perfect knowledge of all who said he had, he had never done any such thing: that, having entered into such contract, he had broken it: and that by so doing he had abdicated the government: while, as everybody knows, he was clinging to it with all his might. Thus (as may be seen in their journals) said the House of Commons: and thus, after kicking against the lie in vain, said at length the House of Lords. The lie was the work of lawyers; for without a lie in his mouth, an English lawyer knows not how to open it. But though being, as it was, an untruth, the antecedent in this argument was unable to give any just support to its consequent, or to anything else; the consequent was in itself good: and in *that* we have all that is to the present purpose.

So much for the difference, or distinguishing criterion, between a *free government* (or, to speak more clearly though less familiarly,) a *non-despotic* government, and a *despotic one*.

Now for the promised *test*, by which, when applied to a man, it may be seen whether the government he means to give his support to is of the one sort or of the other. Put to him this question.—Will you, sir, or will you not, concur in putting matters on such a footing, in respect to the liberty of the press, and the liberty of public discussion, that, at the hands of the persons exercising the powers of government, a man shall have no more to fear from speaking and writing *against* them, than from speaking and writing *for* them? If his answer be *yes*, the government he declares in favour of, is an *undespotic* one; if his answer be *no*, the government he declares in favour of, is a *despotic* one: if yes, his principles as to this matter, are those of the Anglo-American United States, and, as you will see, if you have not seen already, those of the Spanish constitutional code: if no, they are those of ——————, and of the Emperor of Morocco.

Various are the modifications of which meetings for the purpose of political discussion are susceptible. All of them are more or less contributory to both purposes at once—to instruction and to excitation; but some of them are more particularly suitable to the one purpose, others to the other: some have more, some less, of the colour of dangerousness upon the face of them. If, at the expense of general utility, particular anxieties were to be conceded to—if a door were, in that case, found necessary to be left open to compromise, it might be worth while to bring to view the circumstances by which these several modes of communication stand distinguished: it might be worth while to propose this or that succedaneum, by which the anxieties might be calmed, without quite so costly a sacrifice, as the sacrifice of liberty on the altar of despotism.

But Mr. Goreli is inexorable: the principle he has displayed excludes all compromise. Whenever he sees either excitation or instruction, there he sees an enemy. *Meetings?* Oh yes—in any number, and everywhere. Meetings? Oh yes: but on what terms? on condition of their being everywhere under the yoke of a licence—on condition, that is to say, that, on all occasions, the instruction and the excitation shall be all on one side; all on one side, and that, of course, the side of the ruling few—the side which calls for passive obedience and non-resistance—the side, in a word, that stands in constant opposition to the only side, on which it is in the nature of the case that they should be of any use—to the only purpose for which they are in demand.

Not but that in all this Mr. Goreli is perfectly consistent; nothing can be more so,

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The government he has in view—the government, the establishment of which is the object of these his endeavours, is of the *despotic* species. Spaniards! see whether I do him wrong;—see whether the object of these his endeavours be not to exclude all possibility of change, unless it be such as the people, seeing it to be for the interest of their rulers, and against theirs, would, if left at liberty, manifest their disapprobation of; — see whether it be not to exclude from misrule, how consummate soever, all means, and thereby all possibility of correction — from misery, how excruciating soever, all possibility of relief.

Not yet has he proposed the abolition of election meetings in their earliest stage — of those meetings of the subject-many in all their number, and, to outward appearance, in all their force. No: nor is any such change needful for the accomplishment of his purposes. Destitute of that necessary mental discipline which has just been brought to view — strangers to all instruction, to all excitation, to all political correspondence — meeting, the electors will meet and act like puppets, obsequious to this or that official showman's hand. At the time of giving their votes, the code itself inhibits all discussion, and with it all instruction and excitation: and now it is that Mr. Goreli, coming upon them with this law of his, deprives men of all other opportunities of learning the mental exercise — that instrument of independence by which alone the man is distinguished from the puppet.

LETTER III.

On the Liberty of Public Discussion in Free Meetings—Continuation from Letter II.

SPANIARDS! I continue. — The subject is of too great importance to be dismissed, while the mass of documents with which it has furnished me, remains in any part unexamined. In my last you had some remarks of mine on the proposed law itself — "the law regarding public societies," as proposed to the Cortes on the 21st September by Mr. Goreli, in the name of the commission charged with that subject; those remarks being followed by some others of mine on a speech of that same honourable gentleman, which, though delivered so long before as the 4th of that same month, exhibits the considerations which, in the character of *reasons*, had been employed by him to pave the way for the reception of this same proposed law.

On that same occason, namely, that of September 4th, I see exhibited, for that same purpose, reasons from two other public functionaries; viz. one of the king's seven ministers — the minister of the colonies (so I see him styled) and Count Toreno, then and now a member of the Cortes, and since then president.

I begin with the *Minister of the Colonies.* By this official name I find him designated, and not by his proper name. This mode of designation is a real relief to me. It would have been no small one, to have found Mr. Goreli thus anonymous. This relief is, with great prudence, provided for debaters by the tactics of the English parliament. The sound of a man's name, from the mouth of an antagonist, whose utmost powers are at that moment put to the stretch in the endeavour to sink his reputation, is a cause of irritation against which neither habit nor philosophy, nor both together, can sufficiently arm his patience.

Next in order to the proposer of the proposed law, to which, at the end of seventeen days, this debate gave rise — next in order in the debate to Mr. Goreli, but much more abundant (as will be seen) in length and detail, comes the so happily unnamed minister of the colonies.

1. He too is "anxious"— manifestly not less anxious than Mr. Goreli — "that every Spaniard should enjoy full liberty." Yes; but what sort of full liberty? That sort, of course, which is, or is to be, "founded on the law." On the law? Good. But on what law? On that which we have seen already: on the law, which, in embryo, that representative of the people, and this minister of the king, bore each of them, in his breast: the law which I had to lay before you in my last: the very proposed law by which, as you have seen, that same full liberty is proposed to be so fully destroyed.

2. Notwithstanding such anxiety, the anxious gentleman "could not admit the existence of political associations without dependence on the government, and without responsibility of their members." Could not admit of this? No: that I will be bound for him he could not: just as little as I myself could, were I in his place. But what is this to the purpose? As much as if he said he could not admit of rape or robbery. But his inability to admit of rape and robbery could not have afforded a passport to an insinuation which, if produced in the shape of a direct assertion, would have been seen to have been as completely groundless as it was false; it would not have afforded a passport to the assertion: no, nor so much as a cover to the falsity of it. What! by meeting and talking together—let the subject of their talk be what it will, in a room or out of a room, in any number, small or great—do a company of unarmed men become, or it is possible they should fancy themselves to be, *independent*

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of the government under which they thus meet? *independent* of that same government, and exempt from being "*responsible*" to it? Any one of the societies in question, on any charge of specific delinquency, — would an officer of justice have found any greater difficulty in obtaining entrance into it, than if the subject of their conversation had been confined to plays or bull feasts?

3. The candour of this faithful servant of his Majesty is truly admirable: not less so than that of the representative of the people. "I know well," he added, says the report, "I know well that these associations owe their origin to a laudable object."

4. "And that to them," continues the speech, "we owe the acquisition of the good we enjoy." Is it in the power of words to wind up candour to a higher pitch? But, my friends, you have seen already what is at the bottom of it.

Such being the grounds made for gratitude, see, in the next place, the grounds made for annihilation, in proof of gratitude.

5. "But the means," it continues, "which have been employed to acquire it" (to acquire that same good,) "far from being conducive to its preservation, would be the great obstacle to its consolidation." Well: here is assertion; and assertion directly to the point: this is the very thing which, to afford a justifying reason for the proposed law, required to be proved. But the proof, where is it? Go on a little further, and you will see — if not a proof, that which it has been gentlemen's endeavour to cause you to accept for proof. As to probable mischief, in any determinate shape, not any the slightest attempt is made to prove it. Instead of listening to a proof, what he depends upon your doing is, the taking the thing for granted, without so much as an attempt at proof. Why no such attempt? For a perfectly plain reason: because success was, in every eye, impossible.

But if no such proof was brought by him (and you will see whether there was any,) mind the logic of this his argument. By these societies it is that all the good that has been done, has been done. Till this moment, by these same societies, nothing but good has been done. Now for the conclusion — left as it is to be collected from the proposed law: therefore, says this conclusion, by these same societies, if suffered to subsist, nothing will be done but what is bad, — absolutely bad, or at least, when weighed against the good, preponderately bad, in future.

But he does not end here. For now comes a tissue of irrelevancies, in which, in virtue of the confusion in which it promised to involve men's minds, he evidently puts his trust. Mark well the suspicions which by means of it he seeks to infuse into them: mark whether for any of these suspicions he has been able to make so much as the smallest ground.

6. "What comparison is there," continues the speech — "what comparison is there between individual liberty, and that which may be arrogated to themselves by permanent juntas, with peculiar constitutions, secret sittings, dignities, offices, and funds?"

"What comparison?" What means he by *comparison?* What has it to do with the question? Who ever made any such comparison? If there were any meaning to the word, these are the questions, by the answers to which it might be brought to light. But meaning it has none. If *individual liberty* must be spoken of, that which the societies in question had been doing with it *was*, the applying it to that constitutional purpose, of the goodness of which his testimony has been so explicit.

Does he think, by this question — does he think to make you believe, that by preventing you from meeting in societies with these good things in them, no restraint upon your *individual liberty* will be imposed? If not, then by what else can any restraint be imposed upon it? Mistake me not, my friends, so far as to suppose me passing condemnation on a law, as some have done, on no other ground than that of its being a restraint upon individual liberty: it is only by being such, that laws can be laws.

Putting aside these inanities, in the production of which there is no saying in what degree the reporter and the translator may not have had their share — putting aside these debatable points, let us take up the argument: — it is this.

"The societies in question have in themselves permanent juntas, with peculiar constitutions, secret sittings, dignities, offices, and funds." Here we have the *antecedent*. Therefore, says he, they would, if suffered to exist, "be the great obstacle to the consolidation . . . of the good we enjoy." Here we have *the consequent*.

Here, then, we have so many elements, of an unnamed something, by the instrumentality of which, the mischief to which he thus makes allusion would, but for his remedy (he would have you to think) be produced. To this unnamed and undescribed something, by which such prodigious effects would have been produced, I will, under correction, for the purpose of considering whether it be in the nature of the case that it should be composed of such elements, any or all of them, give the name of *power: political power*, if of itself the name of *power* be not sufficiently explicit.

I beg his pardon. Looking out for substantial political meaning, I have overlooked that which is presented by grammatical rules. True it is, that for its indisputable proper

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grammatical *antecedent*, the *relative pronoun-adjective* "*that*" has the noun-substantive "*liberty*," as modified by its noun-adjective "*individual*." But it was by my too good opinion of his logic, that my attention was then called off from his grammar. "What comparison is there between individual liberty?" says he—(he means individual liberty at large)—"what comparison between it, and that which may be arrogated," &c.?—What comparison? My answer is, *that* comparison which there is between *a genus*, and a species of that same genus: if by *comparison* he means *relation*—as I suppose he does, if he means anything—taking this for his meaning, his argument stands thus:—"In your opinion," says he, speaking to the Cortes—"in your opinion, *all* restraints upon individual liberty are bad things." And so they are in mine. But it does not follow, that a restraint upon this individual liberty which I am restraining, is a bad thing: for a restraint upon individual liberty in this shape, is not a restraint upon individual liberty in any shape.

But, putting aside nonsense, and determined to have sense to argue with if possible, I put aside individual liberty, and return to the word *power*: political power.

As to this matter,—power, and *that* pure from all responsibility, and from all dependence on the government,—this is what, according to him, these societies were thus arrogating to themselves.

The essence of this sophistry consists in a *name*—in the name given by him to the one first mentioned by him of these his pretended elements of "independent" and "irresponsible" power, arrogated to themselves, if you will believe him, by these societies. *Permanent Juntas* is the name he, on this occasion, gives to them. For what purpose? I answer (as you, many of you, cannot but have answered already,) for the purpose of assuming as proved, and causing you to regard as already proved, the very thing which he was professing to prove: and thus causing you to regard as proved, that which neither by him had been, nor by anybody else could be, proved. In your constitutional language, *Junta* is a name given to societies by which power is really exercised: *Junta* is a name which I have observed given to societies, by which, for a time, even the supreme power in the state has been exercised. In the ambiguity of this appellative—in the misrepresentation conveyed by the use here made of it—consists the sophism, in which the main strength of his argument lies. This irrelevant sense set aside—what, in its original sense, means "Junta?" A set of men who, for any purpose whatsoever, are *joined* together. This is its generical and widest sense. But, by omission or abridgment, it has come to be used moreover in a limited sense—in that limited sense in which it designates a set of men joined together for the purpose of exercising *power*. In this one word, then, behold here the whole strength of his argument—of this argument which he thus insinuated—and for the absurdity of which he seeks a cover in the use he makes of this ambiguous word. The persons in question are *joined together;* therefore, they are joined together for the exercise of power, and that power, as he had before insinuated, "independent" and "irresponsible."

Still there remains the word *permanent*. If, by constituting themselves *juntas*, the societies in question did not constitute themselves "*juntas arrogating to themselves power independent of government, and irresponsible*," let us see whether they did so by constituting themselves *permanent juntas*. A junta which, after meeting once, has *not* met a second time, has *not* been a permanent junta. But a junta which, after meeting once, *has* met a second time, *has* been a permanent junta. This indeed has been but a small degree of permanence: it has been even the very smallest degree; but still it has been *permanence:* and whether, by the smallest degree of permanence having place in a junta which, at its first meeting, arrogated to itself no power, any power is arrogated, any one may be left to judge. And so, if instead of two meetings, it has had two thousand.

As to "*peculiar constitution, funds*, and *offices*," to say of these societies that they had these things, is nothing more than to say that they were *societies*.

2. "*Peculiar Constitution*."—If the society have an object, be that object ever so perfectly innoxious, some mark or other must the society have to express the object, and to distinguish the members of the society from the same number of men taken at random as they pass along the street; as also from other societies, whatever these may be. Having this, every society must, on pain of not being a society, have a peculiar constitution. Here, then, the right honourable gentleman sees *that* element of independent power which he calls *peculiar constitution*.

3. "*Funds*."—If, in the society, a memorandum is to be made of anything that has passed,—it follows, that for making the memorandum there must be pen, ink, and paper, or something equivalent. But neither pen, nor ink, nor paper, are to be had for nothing. Here, then, the right honourable gentleman sees the element of independent power called *funds*.

4. *Offices:—collector's, treasurer's, receiver's, secretary's, president's.*—If to obtain the purchase-money for the pen, ink, and

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paper, a *quarto* from each member be requisite, and the *quartos* are not all paid at the same moment, here must be a *Collector:* if there be any person by whom the money, when collected, is kept till it is employed in the purchase, here we have a *Treasurer:* if there be any person, who receives it, or any part of it, on its way from the *collector* to the *treasurer*, here we have a *Receiver:* if there be any person whose more particular business it is to make use of the pen, and ink, and paper, for taking the memorandums, or for any other purpose, here we have a *Secretary:* if there be any person whose more particular business it is to prevent disorder in the conversation, here we have a *President:* if neither these nor any other denominations are employed, the *functions* are not the less exercised. Here, and in most formidable abundance, the right honourable gentleman sees the element of independent power called *Offices.*

5. *Dignities.*—What the *dignities* may have been, which the right honourable minister had in view, I cannot pretend to say. In the four preceding articles, I have indicated so many ingredients necessary to the composition of every society for public discussion, be the topic what it may, on pain of its not being a society. Of *dignities*, this is more than I can pretend to say, without the help of a distinction. If, and in so far as the *office*, be it what it may, is regarded as a mark of *illustration*, causing the owner of it, as such, to be regarded with more respect than if he were not so, — on this supposition, indeed, so many *offices*, so many *dignities.*

All this while, true it is, for aught I can pretend to say, in this or that society there may have been this or that individual, bearing or not bearing an office — there may have been one, or even more, by whom, at the desire of the rest, this or that mark of illustration has been possessed. But with regard to the present purpose, by any such mark of illustration how is the case varied? If by the possession of it, so it were that a man possessed anything that could be called *power*, the persons over whom, and in relation to whom, it was exercised, would be the members of the society: but even over *them*, how is it, that by the bare possession of this dignity, whatever it be, anything that can be called *power* is or can be exercised? It cannot, then, give power even when applied to *them:* how much further, then, must it not be from giving any such thing, when applied to anybody else? Here, however, may be seen all that the right honourable gentleman has for his element of independent power called *dignities.*

6. *Secret Sittings.* — As little do I know — and I care almost as little as I know — whether, in the instance of any one of the societies by which such alarms were produced in so many right honourable breasts, there were any sittings that could with propriety be called *secret.* Here, however, a distinction requires to be made: not a little depends on the circumstance of *time* — *relative time. Secresy* imports fear: it is even conclusive evidence of it. Where the secresy has for its accompaniment a design, whether good or bad, it at any rate imports fear of miscarriage, supposing *that* known which is endeavoured to be kept *secret.* Now then, if it was only while the society in question was engaged in the pursuit of the object which he had in view when he was honouring it with the epithet of "*laudable*," it was while they were engaged in the endeavour to free *him* as well as themselves from the yoke of that oppressive power, to which *that* milder power, in the exercise of which he is bearing a part, and which he is making this use of, has succeeded. On this supposition, the secresy had for its cause fear of oppression, fear of being oppressed by the hands which were at the same time inspiring *him* with the same fear. On the other hand, if the time was no other than *that* during which the power was wielded by him and those with whom he acts, the fear had for its object oppression by the hand of himself and colleagues. If, then, during this latter period, any such secresy in the sitting of any society for political discussion had place, the secresy having necessarily fear for its cause — this being supposed, if I were to learn, that of that fear *he* had been the object, and his conduct the source, — if I were to learn this, — judging him from all I know of him, which is this speech, and the proposed law in the support of which it was employed, — my wonder, I must confess, would not be great. On the one supposition, he inflicts punishment for benefits received by him: on the other supposition, he first makes the crime, and then punishes it.

Be this as it may — supposing him really alarmed, and the secresy, and nothing but the secresy, the object of his alarm, the way to quiet it was, to put an end to the secresy. But his object was, not the putting an end to the secret sittings of the societies, but the putting an end to the societies themselves: and this his proposed law but too sufficiently proves. His object was the putting an end to all societies in which any such "individual liberty" should be exercised, as that of representing his measures and designs in any such light as that in which they have presented themselves to the eyes of an impartial observer, viewing them at this distance. For, of everything of that sort, the tendency, how faint soever — the tendency, if it has any, is to oppose an "obstacle" to what he calls

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"*the consolidation* of the *good*" of which he and his colleagues are in the *enjoyment*—the good of which, by the means that you have here a sample of, they are thus labouring for the increase.

"All these criticisms," some will be forward enough to say—"all these criticisms are minute and trifling: criticisms on logic, criticisms on grammar: mere criticisms upon words." Yes: considered merely in themselves, and without regard to the result indicated, they are as trifling as you please. But if the result be regarded, few things can be further from being trifling. For the result indicated,—is it not that the functionaries in question had for their object the substitution of a despotic government to the indespotic government, of which your Constitutional Code affords so well-grounded a promise?—that they were not themselves in an error, but occupied in the endeavours to deceive their colleagues, and to deceive you?—and that in this design it was, that they wove and employed this web of sophistry, which, otherwise than by such verbal criticisms, the nature of the case did not allow to be unravelled?

Gratified, my friends—most sincerely gratified should I be, to find these my remarks as groundless as, in my present view of it, that conduct is to which you have been seeing them thus sincerely and anxiously, howsoever mistakenly, applying themselves.

My friends, I have not yet quite done with this proposed law and its supporters. The messenger presses. But even already I can venture to propose two subjects for your consideration:—Whether, under a government professing not to be despotic, a law more mischievous in its complexion as well as tendency was ever proposed: and whether any law could be proposed on grounds more consummately frivolous.

Looking for the authority of example to supply the deficiency of reason, the right honourable gentleman gives you an account of England. A more complete misrepresentation has not been often given. This I hope to show you in my next.

LETTER IV.

On the Liberty of Public Discussion in Free Meetings—Continuation of the subject from Letter III.

SPANIARDS! I continue, and (I hope) conclude.—In my last on this subject, I left unexamined so much of the speech of the Minister of the Colonies as regards England: this together with the speech that bears the respected name of the Conde de Toreno:—

"In representative governments," adds the Minister of the Colonies—"England, for instance, there are also societies; but they meet for one determined object, and when that is finished, they are dissolved. But permanent societies are *unknown*, unless authorized by the law, and when they have this character, the government will be the first to support them."

1. "In representative governments," says he—"England for instance." But why take England for his instance? Spaniards, I will tell you. Because, if it be the object of a minister to put or keep in the condition of a despotic one, the government of which he forms a part, England, with its government, is the country which, at this moment, will in a more particular manner suit his purpose. Oh yes: it will give him a model, and as complete and serviceable a one as if he himself had the making of it.

England a *representative* government indeed! Oh yes, *that* it is. But a representive of what? of the people? No: but of the Monarch and of the House of Lords. For in this government, divided, as the supreme power of it is, into three branches—the concurrence of which is necessary indeed, but at the same time sufficient for every considerable permanent measure,—the Monarch alone has one branch; the Lords' House another; the Commons' House the third. This being the state of things, if by the representative government he means a government containing in it a branch in which the *people* are represented,—in the English government there is no such branch. For in that last-mentioned House, little less than a majority of those who have a right to sit in it, are seated either by the Monarch or by some member of the House of Lords:—one Lord, for example, seats nine Members; and an overwhelming majority is composed of men seated by individuals whose particular interest, completely identified as it is with the joint sinister interest of the Monarch and the Lords, is decidedly and inexorably hostile to the interest of the great body of the people. Thus it is as to those who have a right to sit: but as to those who on the several occasions actually sit, the disproportion is always much greater: for, even of the few who might be honest if they were not idle, the greater part are, on each occasion, kept from being honest by their idleness. Nor, when they do sit, do they sit, any of them, but in the atmosphere of a corruptive influence, by which their particular interest is identified with the particular and sinister interest of the Monarch and the Lords. Yes, and that still more effectually than if they had merely been seated by them: all, with scarce one exception, being in the condition of men with bribes in their hands, given them by the Monarch, and

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capable of being taken back by him at pleasure, or else upon the look-out for such bribes. This state of things is just as notorious as the existence of the two Houses themselves: nor does any one, even of those most interested in denying it, so much as attempt to deny it. For what purpose should he? The books in which the facts are manifested—manifested in names, numbers, and proportions—being in everybody's hands. In favour of it, all that is ever said is contained in this:—"So it has been and is; therefore so it ought to be."

All this while, what I cannot but confess, is—that in law *fiction*—that is, in liar's language—the government *is* a government representative of the people: and English lawyer's fiction, to which the character of lying belongs, or it does not belong to anything, is the acknowledged foundation of everything with us that is called *law*. In the language of lies, the government, then, *does* continue a body representative of the people: and, as the state of the case is scarce ever brought to view but by the misrepresentation made of it by this lie, and the vast majority of those who have faculty and leisure to make the distinction on such a subject between lies and truths, are paid for giving currency to this and other such lies, and for pretending to take them for truths (for scarce ever does a judge pronounce a decision, and never does a man go to church, without some notorious lie in his mouth;)—thus it is that the right honourable minister of ultramaria had really a colourable pretence for giving, on this occasion, the government of England as an instance of a representative government. If (as is the case, if I misrecollect not, in the government of the Netherlands, in regard to all the representatives)—if (I say) in England, the Monarch, openly, and in a direct form, did nominate five-sixths of the House of Commons,—even thus, if he left the remaining sixth to be elected by the people, so it were upon your principles of universality, secresy of suffrage, practical equality and bienniality, this would be no small improvement, and I would gladly vote for it. For, in this case, the habit of knowingly uttering and knowingly receiving lies as truths, would thus far be narrowed, and dishonest men could no longer join in assuring honest ones that the government is a government representative of the people, as, in so shameless a manner, they do now. Even if the Monarch did by the members of the House of Commons as he does by the Bishops—even if, after having appointed a *junta* for the purpose, he sent them a licence to elect whom they pleased, and along with it the name of a man, whom, on pain that should follow, they were to elect: this, even this, would be an improvement; for nowhere exists there any such impudence as to pretend to believe, that in this case it is by any such junta that the priest is put into a palace and made a lord of; that it is by the members of any such junta that he was thus made; or, in short, by anybody but the Monarch by whom *they* were made. The government would thus be more universally seen than at present to be what it is—a government uniformly determined by a particular and thence sinister interest,—an interest opposite to the interest of the people, and to which the interest of the people is thus necessarily, and on every occasion, sacrificed.

"In *representative* government" indeed! No, my friends: if it had been a government really representative that it had been his interest to direct you to an instance of, he knew well enough where to find one. He would have directed you to those rulers, by whose long-suffering and regard for the interests of *their* fellow-citizens (not to speak of your's) you have for so many years been saved from the additional miseries of an additional war: to a government, in which the interests of the ruling few and the subject-many are so nearly identified, that (were it not for slave-holding—the monster they are actually employed in combating, and the deceit put upon the people by their lawyers; with the English common-law and its lying fictions in their mouths,) misrule in any shape would be a thing utterly unexperienced: and, in what state the societies in question are under that government, I have already had occasion to inform or remind you in the first of these my letters.

But since the English is the government, for the practice of which he has actually referred you as affording an authority for his support in the course taken by him in the proposing of such a law,—follow him, my friends, to England, and see how far his account of the state of the law in that country quadrates with the truth.

"In England," says he, "there are also societies; but *they* meet for one determined object, and when that is finished, they are dissolved." My friends, look twice at this assertion, and then see whether it even stands in need of any external evidence to convince you of the incorrectness of it. In England, there exist not any societies—any societies whatever, existing for any purpose whatsoever—political or non-political (for thus all-comprehensive and unrestricted is the assertion,) that have any more than *that* degree of permanence, if *permanence* it can be called. Consider whether, in the nature of things, this can be true.

But lest that should not be sufficient—lest the assertion should not yet be broad enough,

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he goes on and says — "But permanent societies are unknown, unless authorized by the law." *Unknown*, then, in England, if he is to be believed — not only *unexisting* but *unknown* — are all permanent societies: those included that have any beyond the smallest possible degree of permanence.

Permanent societies unknown in England! Even had he so far narrowed his assertion as to make it applicable to the purpose — even had he said "permanent societies *occupied in political discussions*, are unknown in England" — as well might he have said — sunshine is unknown in England.

To render intelligible the relation between the truth of the case, and the right honourable minister's account of it, I must beg your notice, my friends, for a distinction, which he knew better (it should seem) than to bring to view. This is — the distinction between the state of the government in question antecedently to the enactment of certain recent laws, and the state into which it has been put by means of them. Applied to the *recent* state, you will find his account possessing in part a colour of truth: applied to the *anterior* state, you will find it wholly destitute of all colour of truth.

In doing this, I must begin with giving a determinate import to a phrase of his: — "*authorized by law.*" Speaking of England, "Permanent societies," he says, "are unknown unless authorized by law." Now, by *authorized by law*, what he means is — existing no otherwise than under a licence which the law necessitates; that is, to use the words of his proposed law, "under the permission of the local authority:" for as to the being authorized by law — meaning *real*, and not imaginary *ex post facto* law, — everything is left authorized by law, until it stands prohibited. This being the case, to constitute what he means by "*authorized by the law*," requires in the first place a prohibition — a general prohibition, and upon the back of that a special permission, exempting out of that general prohibition the special objects to which the permission applies. This explained, England being the country in question, how stands the fact? Before the year 1817, the things "*unknown*" were — not the *unlicensed* permanent societies, which *he* says were unknown, but the *licensed* ones, which his endeavour is — to make you regard as being coeval with the constitution: for till March 31st in that year, licences for meeting to talk politics in public were no more known in England than licences for meeting together to dine: and whether by ceasing to be permitted, societies such as those in question can in three and a half years cease to be "*known*" — of this, my friends, you will judge.

Thus much as to the being "*unknown*:" Now as to the being *in existence*. Even as to this point, the fact does not bear him out in his assertion, regard being had to the breadth he has given to it. *Permanent* societies being here in question, and not *ephemeral* ones (they forming the subject of another mode of regulation) the prohibition of permanent societies without licence is confined* to "places used for the purpose of delivering lectures or of holding debates." Thus stands English law: while, according to his account of it, the prohibition of meeting without licence extends to *all* "permanent societies" without exception.

Bad as it is — bad enough for the establishment of finished despotism — the English liberticide innovation, thus introduced into the English government by the professed abhorrers of all innovation, is not yet bad enough for his purpose: to raise it up to his purpose, you see how he gives to it an extent that does not belong to it.

In the breasts of the organizers of this English despotism, there was a something that put a restraint upon it as to *time*. In the first seditious meetings act, as above — the earliest commencement of the act being the 31st of March 1817 — the duration of it was not longer than till the 24th of July 1818; not so much as 16 months: in the second seditious meetings act (the other being expired,) the earliest commencement being the 24th of December 1819, the duration of it was not made longer than five years from that time; five years, with no other addition than that of an indeterminate fraction, extending however no longer than to the "end of the then next session of parliament."

This for the present satisfied English despotism: but this minister of *your* king, nothing less than an *eternity* of such despotism would satisfy *him*, or at least his supporter in the Cortes, Mr. Goreli.

"And when they have this character," concludes this speech, "the government will be the first to support them;" namely, permanent societies, without exception: this character; namely, the character of being, in the language of English law, *licensed* — in the language of the proposed Spanish law, in possession of "a permission from the local authority."

My friends, in this clause, short as it is, I see three erroneous notions presented for acceptance.

One is, that societies of the sort in question are *capable* of standing in need of support, in some shape or other, from government.

Another is, that government has it in its power to render service in some shape or

* Seditious meeting act, passed December 24, 1819, 60 Geo. III. & 1 Geo. IV. c. 6, § 26.

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other to the public, by means of support given in some shape or other to these societies.

A third is, that, in some shape or other, support, meaning *special* support, may be *capable* of being given by government to the sort of societies in question, *without being* pernicious.

1. First, as to the *need* of support. Antecedently to any licence, they have for their support, the natural, original, unrestricted individual liberty. The members, as such, have no need of any other: as *men* they have indeed *need* of, but of course *have*, that protection, whatever it be, which the law affords to all other men. This is support, but not *special* support. Invade this liberty—narrow it by a *prohibition* — you thus indeed create in them the need of the *permission*, whatever it be, with which you will vouchsafe to narrow the prohibition. But when you have done this for them, you have done all they have need of, unless it be the easing them of the *prohibition*, of which, by the supposition, you will not ease them: do this, you have thus far replaced them in that original situation, in which, as above, no support was either needful to them, or of use.

2. Secondly, as to government's having it in its *power* to render any service to the public at large, by means of special support, given in any shape, to these societies.

3. Thirdly, as to the *disservice*, which government would do to the public at large, by means of, and in proportion to, support given in any shape, to these societies.

For these two points, one consideration may suffice. By support, in any shape, no service, I say, could government render to the public at large. Of support given to them in any shape, the effects, if any, with reference to the public at large, could not, I say, fail of being pernicious: for, according to the value of the support, the effect would be to diminish whatever service they might be capable of rendering to the public, if they were let alone.

Such is my notion of the matter: the following are the grounds of it: —

All the service capable of being rendered to the public by these instruments, is, as above observed, comprised in the two words *instruction* and *excitation*; — the excitation being no otherwise serviceable than as the instruction is so too.

But, of the matter of instruction, what is it, the dissemination of which, by any such means, is, or can be, of a nature serviceable to the public? This, too, has been already mentioned: indication of what is *amiss*, either in the texture of the government, or in the conduct of those to whom the exercise of it powers belongs. This, and nothing else.

"What! nothing else?" says somebody— "by the indication of what is *right* in both places, is no service rendered to the public?" I answer, No: none that can be rendered by these societies, over and above what would be sufficiently rendered without them. Whatsoever there is *right* in either place, there are always men in abundance to hold up to view. Mankind must change its nature, ere anything that is said in commendation either of government or of rulers, can fail to be generally acceptable to the aggregate composed of those same rulers. But, without need of being expressly offered, a mass of reward, composed of all the good things that are at the disposal of government, is, by every man, seen stationed over his head, ready to drop, in appropriate and adequate morsels, into the mouth of every man who will be at the pains of earning it, by signalizing himself in the defence of everything or anything, and every person or any person he sees established. Of these ready defenders, there never can be a deficiency, supposing *no* such societies in existence: of these same defenders, as little can there be a deficiency, supposing *any number* of these societies in existence. Thus it is, that even without the advantage given them by the restraint imposed upon their adversaries by the licence, and the fear of forfeiting it, things and persons that are established are, by the mere circumstance of being established, put into possession of an undue advantage: an advantage which the nature of their situation secures to them, how opposite soever their character may be to what it should be. As to everything that happens to be *wrong* in those same high places, for the indication of it there is *no* such reward; while for *defence* of it, there is, as we have seen, in prospect and expectancy at least, an infinity of reward. Thus stands the matter, even *without* the licence. As if that were not enough, comes the licence, and, in endeavour at least, not only leaves the evidence on one side of the cause without motives for bringing it forward, but, by an artificial door thus shut against it, superadds the forcible exclusion of it. Such is the system of procedure, according to which, at the bar of the public, its functionaries, while their adversaries are under the yoke of a licence, are tried.

"Government," concludes the speech, "will be the first to support them"— these same societies. Under this phrase lurks yet another fallacy as yet unexposed; namely, that even when the societies are thus licensed, thus corrupted, thus depraved, thus filled with the defenders, to the exclusion of the indicators, of abuse, government will be at the pains of taking any such active measures for their support. Of all such active

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measures, it has just been seen that they are altogether needless. There, upon a shelf just over their heads, in goodly order — there, in men's imagination, stand the rewards; — there, without any need of special invitation, hands enough will be ready enough to grasp them.

All this while, that which, in speaking of the corruptive influence of licences in this case, is here said, should, it must be confessed, be understood as applying more perfectly to what it is in the conception of those *by* whom the yoke is imposed, than of the actual effect on those *on* whom it is imposed. What is scarcely possible is, that by the repressive influence of the licence, every manifestation of disapprobation, towards the conduct of those by whom the yoke is imposed, should, in every shape, be prevented. By degrees, a sort of language will come into use; a language that will be sufficiently understood for any such purpose as that of giving expression to complaint and indignation, yet will not be sufficiently understood for any such purpose as that of affording a tenable ground for the infliction of punishment.

Yes: in every apartment defiled by this liberticide yoke, the instrument of thraldom, the parchment or paper on which it is written, should be hung up on high — hung up in some spot universally conspicuous, with an appropriate accompaniment for pointing men's attention to it. By a single glance directed to this instrument of tyranny, eulogy might thus be converted into satire, — satire which, be it what it may, can never be too severe.

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